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PREFACE

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PRIVATE AND PUBLIC INTERNATIONAL LAW ASPECTS OF GOVERNMENT CONTRACTS *

By Major Norman L. Roberts**

This article is a study of the law governing United States military procurement conducted outside the United States. Emphasis is placed on the recognition of the sources of law which apply to offshore contracts and the relationship between these rules and public and private international law. Specific topics discussed include the remedies available to resolve disputes arising out of offshore contracts, the effect offshore procurement has on the doctrine of sovereign immunity, and the problem of the proper choice of law to be applied in determining the contracting parties' respective rights and responsibilities.

I. INTRODUCTION

As the number of United States military forces stationed abroad increases, the manner in which they accomplish their mission becomes even more important. The purchasing of supplies and services to support this military force has become a major function of the United States military establishment. When this procurement is accomplished by a military purchasing office located outside the United States for the support of United States forces in these foreign areas, it is commonly referred to as off-

* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Fourteenth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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shore procurement. More correctly, it is contracting on the international level.

Offshore procurement is kin and cousin to government procurement accomplished within the United States but differs because it is accomplished within an area under the control and responsibility of another sovereign. Because the United States must deal with this foreign sovereign to determine the method by which offshore procurement will be accomplished, principles of public international law are necessarily involved. As the United States also steps into the market place in these foreign countries to deal with foreign nationals and business entities, principles of private international law are used to determine the respective rights and responsibilities of the contracting parties. It is the purpose of this article to explore the rules governing United States military procurement accomplished outside the United States. This necessarily includes not only an analysis of how common principles of public and private international law are applied in accomplishing offshore procurement, but also the effect military procurement has on the development of principles of international law.

To begin the study the sources of law and regulation applicable to procurement outside the United States are closely examined. These basic sources are not analyzed to show the exact rules to be followed in a particular foreign country for such rules are constantly changing. Rather, through a somewhat historical and compartmentalized approach to the legal sources, the manner which the law governing offshore procurement is created, organized and applied becomes clearer and hopefully understandable.

In order to visualize the practical effects created by the interplay between the various international agreements, domestic laws, and implementing regulations concerning such procurement, a detailed examination is made of United States military procurement practices in France and the Federal Republic of Germany. Through this examination it is hoped that some of the methods used for solving the conflicts which arise in these countries may be of value and use to those confronted with similar problems in the future.

In many contracts, disputes between the buyer and the seller do occur; offshore contracts are no exception. Consequently, the remedies available to the parties to settle their differences are examined with particular attention given to the disputes procedure

stipulated in most offshore contracts. Included is a study of the recognition given the contract disputes procedure by both the foreign contractor and his government. As both parties resort at times to the courts of the United States and even those of the foreign country where the contract is performed, this remedy is also examined. This practice has a considerable effect on the traditional doctrine of sovereign immunity by which a government such as the United States cannot be sued without its consent. The nature of this effect, the measures sometimes taken to insure its application to suits arising out of offshore contracts, and the practice of the United States in waiving this doctrine in certain cases, are examined in detail. Finally, the remedies of arbitration and conciliation are explored briefly as to their application to disputes arising out of offshore contracts and their effectiveness in resolving such a dispute.

Some of the tools which may be used to avoid the uncertainty in the law applicable to contracts with parties from different countries are discussed. These tools include the use of choice of law and forum clauses in individual offshore contracts. The recognized purpose of such clauses is to provide a degree of certainty regarding what system of law shall be applied, and by which judicial or administrative body, in determining the contractual obligations of the parties. The practice of using such tools and the recognition given them by United States and foreign courts is digested to determine their present and future usefulness.

Where the parties are not allowed to choose the system of law to be applied to their contract or such a choice is judicially declared unenforceable, the rules used by administrative and judicial tribunals in resolving disputes which arise under a contract having an international character are illustrated. This examination includes the practice of United States courts and the Armed Services Board of Contract Appeals in looking to foreign law and custom when determining the respective rights of the parties under such a contract. The need for proper pleading and proof of foreign law is discussed since past litigation of government contracts indicates some misunderstanding of the requirements normally demanded in similar cases involving suits between parties to a contract having an international character.

It is not the purpose of this article to examine in detail every facet of offshore procurement; nor is it a portrayal of the history

of such procurement other than is necessary to show the development of the sources of law which have created the problems discussed. The primary legal distinction between offshore military procurement and procurement accomplished within the United States is the sources for, and the application of, the rules governing it. They are somewhat unfamiliar concepts to one not previously involved in private or public international law. Once one becomes at ease with these rules, the manner in which they are interpreted and applied, the myriad of international agreements all touching on the subject of offshore procurement in a particular country, the sooner some of the resulting uncertainty can be eliminated. If this article assists to remove some of the confusion, the task has been worthwhile.

II. SOURCES OF LAW GOVERNING OFFSHORE PROCUREMENT

When accomplishing procurement for the United States within the United States, certainty of the law to be applied is far greater than when accomplishing this task in a foreign country. Experience in offshore procurement pointedly reveals the tendency of personnel so engaged to believe that the rules normally applied can be thrown to the winds and resort made to that method of operation which appears most expedient to accomplish the mission.

Although there may be less certainty regarding the applicable rules of law, such rules do exist; and they do not exist merely in the form of generalities to be interpreted as best appears to fit the individual situation. This does not mean that there is a law or regulation for every detail of which offshore procurement is concerned or that there is uniformity of application of these rules in every foreign country in which the United States enters the market place. Yet, it is possible to outline in some detail the development of the various rules and regulations applicable to offshore procurement. Through a detailed study of offshore procurement in the countries of France and Germany the sense of organization of such rules can be realized to a fuller extent.

Where then are such rules to be found? What is the source of the rules governing offshore procurement? As we shall see, the primary sources are United States law and regulations, and provisions of certain international agreements between the United

States and the country where offshore procurement is effected, which may make certain principles of foreign law applicable.

A. *LAW AND REGULATIONS*

It has often been said that the Armed Services Procurement Regulation (ASPR)[1] is the "bible" of Department of Defense procurement. If this statement is correct, it must be kept in mind that it is no less true for offshore procurement than it is for procurement accomplished within the United States. Any analysis of government contracts placed overseas will quickly demonstrate that the vast majority of the provisions of such contracts find their source in ASPR provisions or a modified version.

Of course implementation of ASPR is necessary when dealing with a foreign contractor not subject to United States laws; and every rule contained in ASPR does not literally apply to offshore procurement. However, this is not to say that where a rule promulgated in ASPR does not apply, one is free to develop his own standard.

Implementation of ASPR and the other individual service regulations regarding procurement[2] is found principally in regulations promulgated by the senior United States forces commander or head of procuring activity[3] in the overseas area where offshore procurement is carried out.[4] Due to the desire of the Department of Defense to eliminate the great volume of various implementing

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[1] The Armed Services Procurement Regulation (hereafter cited as ASPR) is issued by the Assistant Secretary of Defense (Installations and Logistics) by direction of the Secretary of Defense and in coordination with the Secretaries of the Army, Navy, and Air Force and the Director of the Defense Supply Agency under the general authority contained in chapter 137, Title 10 of the United States Code. It establishes for the Department of Defense uniform policies and procedures relating to the procurement of supplies and services and has the force and effect of law. See Paul v. United States, 371 U.S. 245 (1963); G. L. Christian & Associates v. United States, 160 Ct. Cl. 1, 320 F.2d 345 (1963), *cert. denied*, 275 U.S. 954 (1964).

[2] These are principally the Army Procurement Procedure (APP), the Air Force Procurement Instruction (AFPI) and the Navy Procurement Directives (NPD) which are promulgated under the authority set forth in ASPR § 1–108 (Rev. 12, 1 Aug. 1965).

[3] ASPR § 1–201.7 (Rev. 11, 1 June 1965) defines Head of Procuring Activity as including the chief, commander, or other official in charge of a Procuring Activity. Procuring Activities within the Department of Defense are listed in ASPR § 1–201.14 (Rev. 14, 1 Dec. 1965).

[4] Authority for promulgating such rules exists in ASPR § 1–108(a)(v) (Rev. 12, 1 Aug. 1965).

regulations of ASPR by the individual services and heads of procuring activities, it is required[5] that any such implementing instruction be coordinated first with the ASPR Committee.[6]

These implementing rules are not found in separate regulations for each country but rather there is generally a regulation governing offshore procurement in the North Atlantic-Mediterranean area, including all of Europe, and regulations for other geographical areas in which the United States employs significant military forces. A discussion of the basic Army implementation governing procurement in the North Atlantic-Mediterranean area (Europe) is illustrative of the manner in which this is accomplished.

Prior to April 1965 each of the armed services published regulations implementing ASPR to include worldwide service regulations regarding offshore procurement. There was no Department of Defense regulation setting forth detailed procedures applicable to procurement overseas. For the Army the implementing regulation was pubilshed as the USAREUR Procurement Procedure (UPP).[7] In early 1965 the European Offshore Procurement Policy Coordinating Committee[8] undertook the development of uniform policies in implementation of ASPR regarding procurement of supplies and services in Europe. This regulation is known as the ASPR USEUCOM Supplement[9] and applies to procurement by all three services.[10] It is the declared purpose of this Supplement to meet the special procurement problems of all three

[5] *Ibid.*

[6] The ASPR Committee is a joint tri-service committee established to monitor and develop the rules affecting Department of Defense procurement.

[7] The term USAREUR refers to United States Army, Europe, with headquarters in Heidelberg, Germany. Due to the fact that under ASPR § 1-201.14 (Rev. 14, 1 Dec. 1965) the Commanding General, United States Army Communications Zone, Europe, is charged with responsibility for all Army procurement in Europe, this regulation is promulgated by him rather than by the senior Army Commander in Europe, the Commander in Chief, United States Army, Europe.

[8] This committee is under the command jurisdiction of the United States European Command (USEUCOM), the senior joint service command in Europe.

[9] Armed Services Procurement Regulation USEUCOM Supplement (April 1965) [hereafter referred to as ASPR USEUCOM Supp.]. Material provided in this regulation is first submitted for approval to the ASPR Committee. It is then issued by direction of the Assistant Secretary of Defense (Installations and Logistics) pursuant to authority contained in Title 10, United States Code, section 2202 (1964), and in Dep't of Defense Directive No. 4105.30 (11 March 1959).

[10] ASPR § 1-104(b) (Rev. 10, 1 April 1965).

services in the North Atlantic-Mediterranean geographical area including all of Europe.[11] Where individual services consider it necessary to implement the regulation, their proposed implementation must first be approved by the Commander in Chief, United States European Command, and then coordinated with the ASPR Committee before being promulgated.[12]

Thus, in regard to regulations governing offshore procurement, we have the following principal sources in descending order or authority: (1) Armed Services Procurement Regulation; (2) ASPR USEUCOM Supplement; (3) individual service worldwide implementing procedures, instructions or directives;[13] and (4) local regulations published by the head of procuring activity in the foreign area where offshore procurement is accomplished.[14]

B. *INTERNATIONAL AGREEMENTS*

When one begins to analyze international agreements as a source of rules governing offshore procurement, the first tendency is to treat the matter rather summarily due to the apparent conflict and inconsistency involved in the multitude of agreements applicable. The reader may be cautioned to closely examine the agreements, and it is inferred that he should probably believe only one-half of what he reads as new agreements are constantly made and the actual practices of the parties may differ from their expressed intentions. Yet, through close examination of this source of the law as it concerns offshore procurement, certain rules become evident.

Before taking a closer look at some of these agreements, one must have an understanding of the rules generally recognized for interpretation of such agreements.[15] It is common to find many international agreements, negotiated at various levels of authority, applicable to offshore procurement in any given foreign country.

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[11] ASPR USEUCOM Supp. § 1–101 (April 1965).

[12] ASPR § 1–108(a)(vi) (Rev. 12, 1 Aug. 1965).

[13] This category includes primarily the Army Procurement Procedure (APP), Air Force Procurement Instructions (AFPI), and the Navy Procurement Directives (NPD).

[14] For Army procurement in Europe, see USAREUR Procurement Procedure promulgated by the Commanding General, United States Army Communications Zone, Europe [hereafter referred to as UPP].

[15] For a general discussion, see RESTATEMENT, THE FOREIGN RELATIONS LAW OF THE UNITED STATES 421–600 (proposed official draft, 3 May 1962) and JESSUP, A MODERN LAW OF NATIONS 123–56 (1952).

These agreements may be in the form of the classic treaty receiving the advice and consent of the United States Senate, or they may be executive agreements, or even agreements negotiated by military authorities located in the foreign area with a procurement mission.[16] Also one should not expect, at least at first glance, to find that all of these agreements regarding a particular foreign country will be reconcilable with each other or that the states which are parties will recognize that a later agreement supersedes an earlier one appearing to treat the same subject matter.

The existence of international compacts as a source of law governing offshore procurement is recognized in the Armed Services Procurement Regulation.[17] Deviations from ASPR which are required in order to comply with a treaty or executive agreement to which the United States is a party are specifically authorized unless the deviation substantively affects a provision of ASPR that is based on the requirements of United States law enacted after execution of the treaty or executive agreement. In the event the treaty or executive agreement is inconsistent with the requirements of the law enacted after execution of the treaty or executive agreement, any request to deviate from ASPR must be referred to the ASPR Committee for consideration.

Generally, international compacts regarding the method by which the United States shall enter foreign market places to do business provide for one of three procedures: (1) the United States may accomplish its procurement in accordance with its own laws and regulations, without substantial impairment by the government of the country in which such procurement is effected; (2) the United States may accomplish its procurement only through an agency of the government of the country in which the procurement will be accomplished and the host government's laws shall govern the contractual relationship; or (3) the United States may accomplish its procurement under a mixed procedure whereby it applies its normal procedures in some situations, but in others, contracts must be placed and administered in accordance with certain special rules and regulations desired by the country in which the contract is to be awarded and performed.

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[16] For an understanding of the relationship of one type of agreement to the other see Schubert, *The Military Agreement in United States Law and Practice*, 19 MIL. L. REV. 81 (1963).

[17] See ASPR § 1-109.4 (Rev. 12, 1 Aug. 1965).

To generalize does not, however, instill an understanding of the rules established pursuant to the provisions of such international agreements. The practical results must be examined. Thus, a closer examination of each of the three methods listed in the preceding paragraph must be made.

In the early 1950's when the United States was involved in the far-reaching task of procuring supplies and services to support both offshore procurement for United States forces stationed abroad and the Military Assistance Program,[18] it was found necessary to negotiate a series of bilateral agreements with various European countries where this procurement would be accomplished. Through these agreements an understanding was reached with the foreign government, upon whose territory the procurement would be effected, on the manner of its accomplishment and to what extent the host nation would or could control the methods used. Separate agreements were executed between the United States and Belgium,[19] Denmark,[20] France,[21] Federal Republic of Germany,[22] Greece,[23] Italy,[24] Luxembourg,[25] The Netherlands,[26]

[18] Authority for offshore procurement undertaken in connection with the Military Assistance Program is now contained in the Foreign Assistance Act of 1961, 75 Stat. 424 (1961), as amended, 22 U.S.C. §§ 2151–407 (1964). This act generally superseded the Mutual Security Act of 1954, ch. 936, 68 Stat. 832 (1954). The underlying objectives and policies of the Foreign Assistance Act are to maintain security and promote the foreign policy of the United States through giving military, economic and technical assistance to friendly countries in order to strengthen mutual security and individual as well as collective defense of the free world.

[19] Agreement and Exchange of Notes with Belgium Relating to Offshore Procurement, 2 Sept. 1953 [1954] 2 U.S.T. & O.I.A. 1311, T.I.A.S. No. 3000, as amended, 19 Nov. 1953 [1954] 2 U.S.T. & O.I.A. 1334, 1352, T.I.A.S. No. 3001; 13 May and 19 July 1954 [1954] 2 U.S.T. & O.I.A. 2254, T.I.A.S. No. 3085 [hereafter cited as Belgium Bilateral Agreement of 1954].

[20] Agreement Relating to Offshore Procurement in Denmark, with Memorandum of Understanding and Model Contract, 8 June 1954 [1958] U.S.T. & O.I.A. 141, T.I.A.S. No. 3987 (exchange of notes) [hereafter cited as Danish Bilateral Agreement of 1954].

[21] Memorandum of Understanding Relating to Offshore Procurement and Model Contract, 12 June 1953, printed in § VI, pt. 9, tab 3, ASPR USEUCOM Supp. (April 1965) [hereafter cited as French Memo of Understanding of 1953].

[22] Agreement with the Federal Republic of Germany Relating to Offshore Procurement, 4 April 1955 [1957] 1 U.S.T. & O.I.A. 157, T.I.A.S. No. 3755, as supplemented to include Model Contract, 4 April 1955 [1957] 1 U.S.T. & O.I.A. 497, T.I.A.S. No. 3804 (exchange of notes) [hereafter cited as German Bilateral Agreement of 1957].

[23] Agreement Concerning Inspection and Acceptance Testing, Security, and Storage of Military Items Produced by Greek Industries Under Offshore

Norway,[27] Spain,[28] Turkey,[29] United Kingdom of Great Britain and Northern Ireland,[30] and Yugoslavia.[31]

Except as otherwise noted below, the following general principles are contained in each agreement:[32]

Procurement Program, with Memoranda of Understanding, 17 and 24 Dec. 1952 [1952] 4 U.S.T. & O.I.A. 5330, T.I.A.S. No. 2738 (exchange of notes); Agreement relating to Certain Procedural and Interpretative Understandings Relative to Offshore Procurement Program in Greece, 30 July 1954 [1954] 2 U.S.T. & O.I.A. 1554, T.I.A.S. No. 3034 (exchange of notes), as amended 14 Oct. and 12 Nov. 1954 [1955] 1 U.S.T. & O.I.A. 99, T.I.A.S. No. 3173 [hereafter cited as Greek Bilateral Agreements of 1954].

[26] Agreement Relating to Offshore Procurement with Memorandum of Understanding and Model Contract, 31 March 1954 [1954] 3 U.S.T. & O.I.A. 2185, T.I.A.S. No. 3381 (exchange of notes) [hereafter cited as Italian Bilateral Agreement of 1954].

[27] Agreement Relating to Offshore Procurement Program, 17 April 1954 [1955] 3 U.S.T. & O.I.A. 3989, T.I.A.S. No. 3415; Agreement Approving Offshore Procurement Contract with Luxembourg, 17 April, 10 May, 16 July 1954 [1955] 3 U.S.T. & O.I.A. 4009, T.I.A.S. No. 3416 (exchange of notes) [hereafter cited as Luxembourg Bilateral Agreement of 1954].

[28] Agreement Relating to Memorandum of Understanding and Model Contract for Offshore Procurement Program, 15 April and 7 May 1954 [1954] 2 U.S.T. & O.I.A. 2027, T.I.A.S. No. 3069 (exchange of notes) [hereafter cited as Netherlands Bilateral Agreement of 1954].

[29] Memorandum of Understanding Regarding Offshore Procurement with Model Contract, 10 March 1954, printed in § VI, pt. 9, tab 9, ASPR USEUCOM Supp. (April 1965) [hereafter cited as Norwegian Memo of Understanding of 1954].

[30] Agreement Relating to Offshore Procurement in Spain, with Memorandum of Understanding and Standard Contract, 30 July 1954 [1954] 3 U.S.T. & O.I.A. 2328, T.I.A.S. No. 3094 (exchange of notes), as amended, 26 Oct. 1954 [1954] 3 U.S.T. & O.I.A. 2357, T.I.A.S. No. 3094; 21 and 27 Dec. 1956 [1956] 3 U.S.T. & O.I.A. 3460, T.I.A.S. No. 3721; 29 Oct. and 11 Nov. 1958 [1959] 1 U.S.T. & O.I.A. 344, T.I.A.S. No. 4196 [hereafter cited as Spanish Bilateral Agreement of 1954].

[31] Agreement Relating to Program of Offshore Procurement, with Memorandum of Understanding, Model Contract attached, 29 June 1955 [1955] 2 U.S.T. & O.I.A. 2071, T.I.A.S. No. 3372 (exchange of notes) [hereafter cited as Turkish Bilateral Agreement of 1955].

[32] Memorandum of Understanding Relating to Offshore Procurement Programme with Model Contract, 20 Oct. 1952, printed in § VI, pt. 9, tab 12, ASPR USEUCOM Supp. (April 1965) [hereafter cited as British Memo of Understanding of 1952].

[33] Memorandum of Understanding Relating to Offshore Procurement with Standard Contract and Related Notes, 18 Oct. 1954 [1956] 1 U.S.T. & O.I.A. 849, T.I.A.S. No. 3567, as amended, Agreement Relating to Termination of Military Assistance Furnished on Grant Basis and Amending Memorandum of Understanding of 18 Oct. 1954 Relating to Offshore Procurement, 24 Aug. 1959 [1959] 2 U.S.T. & O.I.A. 1468, T.I.A.S. No. 4300 (exchange of notes) [hereafter cited as Yugoslavia Memo of Understanding of 1954].

[34] Material quoted from ASPR USEUCOM Supp. § 6-904(b)(1)-(15) (April 1965).

(1) *Applicable Procurement Law.* Offshore procurement will be conducted in accordance with the laws of the US governing military procurement and the Military Assistance Program. This principle is not included in the agreement with Greece.
(2) *Intergovernmental Coordination.* The US program will be coordinated with the defense program of the country involved. This principle is not included in the agreements with Greece and Yugoslavia.
(3) *Contract Placement.* OSP [Offshore Procurement] contracts will be awarded and administered by procurement officers of the US military departments. This principle is not included in the agreement with Greece.
(4) *Parties to Contract.* The US may contract with the Memo country or directly with private individuals, firms, or other legal entities, as deemed appropriate in each individual case.
(5) *Assistance and Enforcement.* The Memo country will, upon request, lend assistance in the selection of contractors and subcontractors and lend its good offices in connection with the enforcement of contract terms. This principle is not included in the agreement with Greece.
(6) *Supply of Equipment, Materials, Manpower and Services.* The Memo country will accord to OSP contractors and subcontractors priorities for equipment, materials, manpower, and services, as well as import authorizations, equal to those accorded any other contractors performing similar defense contracts for the memo country.
(7) *Export Authorizations and Destination of End-Items.* The US will give notification of the destination of end items as soon as feasible and the memo country will grant the necessary export authorizations. The United States, however, will not be bound by such notification. This principle is not included in the agreement with Greece.
(8) *Security.* Classified material furnished by the United States will be given an equivalent classification by the memo country and afforded appropriate protection.
(9) *Inspection.* The United States has responsibility for inspection of supplies or services procured, but as a rule the various agreements provide that the memo countries agree to carry out inspections free of charge, except in instances where special expenses are involved.
(10) *Credit Arrangements.* Offshore procurement contractors are afforded the same consideration as other firms whose operations aid in increasing receipt of hard currency.
(11) *Taxes and Duties.* See Section II, Part 4 of this Supplement.[35]

[35] This section of the ASPR USEUCOM Supplement has not yet been published. However, the various tax relief agreements concluded between the United States and foreign governments in Europe may be found in ASPR USEUCOM Supp. § VI, pt. 9, tabs 15–29 (April 1965). The basic procedures implementing these agreements are now contained in Headquarters, U.S. European Command Directive No. 70–13 (10 Feb. 1964). Additional implementing provisions are contained in the individual service regulations promulgated by the United States military commander in Europe responsible for procurement for his service. Procedures for the Army are set forth in the USAREUR Procurement Procedure.

(12) *Immunity from Legal Process.* The United States is entitled to immunity from legal process in connection with offshore procurement contracts.

(13) *Contract Terms.* The memo countries have agreed that cost-plus-a-percentage-of-cost type contracts will not be utilized.

(14) *Profits.* The memo countries have agreed that they will realize no profit of any nature on these transactions.

(15) *Reporting of Subcontracts.* The memo countries have agreed that information relating to the placement of subcontracts will be furnished the United States. This principle is not included in the agreements with Greece, Italy or the United Kingdom.

It is apparent that the United States may generally accomplish its offshore procurement within the foreign country in accordance with United States law governing military procurement.[34] Thus, in those countries where military offshore procurement is controlled solely by one of these bilateral agreements the procurement mission of the United States is accomplished in a manner substantially similar to that employed within the United States. It must be kept in mind, however, that the time frame in which these agreements were negotiated was a period in which many of the countries of Europe were actively seeking United States military procurement due to the poor economic situation existing in their own countries and their desire for hard currency and aid under the Marshall Plan. Although many features of these agreements were considered somewhat distasteful, they appear to have been accepted for fear of losing the much needed economic stimuli which military procurement would provide. In subsequent years, it is not surprising to find a number of these nations refusing to apply the principles set forth in the bilateral agreements if any pretext for such a refusal is found to exist.[35] An example of the difficulties in this regard can be seen in the later discussion of procurement practices in France.

One problem which has arisen is that procedures for accomplishing offshore procurement in many of the same countries having a bilateral agreement with the United States have also been covered by later international agreements. These later agree-

[34] The only exception appears to be Greece.

[35] This refusal possibly is based on the doctrine of *rebus sic stantibus*, that is, every international agreement has to be understood under the conditions which prevailed at the moment of its conclusion. For a discussion of this doctrine see BRIERLY, THE LAW OF NATIONS 335–36 (6th ed. 1963); 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 511 (1927).

ments are not always consistent with the terms of the bilateral agreements nor have the parties necessarily agreed concerning which agreement is to control.

Later agreements have sometimes provided that procurement by United States military forces within a foreign country shall be accomplished through the authorities of the foreign state rather than directly by United States contracting officers. An example of this form of agreement is the NATO Status of Forces Agreement.[36] In regard to procurement by the military forces of one country situated in another country, each of which is a party to the agreement, it is stipulated that:

> Goods which are required from local sources for the subsistence of a force or civilian component shall normally be purchased through the authorities which purchase such goods for the armed services of the receiving State. In order to avoid such purchases having any adverse effect on the economy of the receiving State, the competent authorities of that State shall indicate, when necessary, any articles the purchase of which should be restricted or forbidden.[37]

When one notes the countries which are parties to the NATO Status of Forces Agreement and those which are parties to bilateral agreements,[38] it is readily apparent that the procedures for accomplishing offshore procurement are conflicting and uncertain in those countries who are party to both types of agreements. As stated previously, the NATO Status of Forces Agreement provides that procurement by United States forces stationed in a foreign country shall normally be accomplished through the authorities of the host state. However, the bilateral agreements provide that the United States may place its offshore procurement contracts directly with the foreign firm when and where it desires. The method by which this inconsistency is sometimes resolved is discussed with regard to procurement practices in France.

The third situation created by agreements between the United States and certain foreign countries in which offshore procure-

[36] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951 [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846 [hereafter referred to as NATO SOFA]. This agreement was originally signed by Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, The Netherlands, Norway, Portugal, United Kingdom and the United States.

[37] NATO SOFA art. 2, para. 2.

[38] See notes 19–31 *supra*.

ment is accomplished is clearly the predominant method used in Europe. This method is composed of a combination of those practices used by the United States in effecting procurement within the United States and certain practices which the foreign government desires with respect to particular procurement actions accomplished within the borders of that state. A closer examination of United States offshore procurement practice in France and Germany is considered not only illustrative of this method of offshore procurement but also provides some insight of how apparent conflicts between several international agreements, all containing provisions regarding procurement by the United States within the borders of the foreign state, are sometimes reconciled.

1. *Offshore Procurement in France.*

United States offshore procurement in France is presently affected by the following international agreements between the two countries:[39]

(1) System of Communications Agreement of 1958 (SOC) (U).[40] The provisions regarding procurement in this agreement are very broad, and they contain general statements which merely establish the principle that United States military forces may procure in France. There is no definite procedure or restriction concerning such procurement set out therein.[41]

[39] These agreements are listed and discussed historically in order to demonstrate more clearly how the procedures applicable to offshore procurement are developed within a particular foreign country. As is France, the United States may initially accede to having its requirements for needed supplies and services obtained through contracts awarded and administered directly by the host government. Then as the military operations of the United States become more stable within the host country, the United States will attempt to participate more actively by directly contracting with the local firms and individuals. Also, special agreements are many times made in regard to certain specific operations which the United States military will conduct within the host country. These agreements often include provisions regarding the manner in which procurement by the United States in support of that special operation will be accomplished. Due possibly to the lack of complete coordination between all elements of the governments concerned, these provisions are not always reconcilable with what is provided in other agreements between the two countries.

[40] A copy of this classified, unpublished agreement is on file at Headquarters, U.S. Army, Communications Zone, Europe [hereafter cited as HQ USACOMZEUR]. This agreement covers many other facets of United States military operations in France besides procurement. Due to its classification for reasons of national security, only those comments disclosed in unclassified sources are included in this article.

[41] See HEADQUARTERS, U.S. ARMY COMMUNICATIONS ZONE, EUROPE, PROCUREMENT DIVISION, PROCUREMENT IN FRANCE, para. 2a (1962) [hereafter

(2) Line of Communications Procurement Procedures Agreement of 1950 (LOC) (U).[42] This agreement is the implementation of the Line of Communications Agreement of 1950 which was superseded by the SOC Agreement of 1958. By specific language in the SOC Agreement, the LOC Procurement Procedures Agreement is still in force and effect and applicable to procurement undertaken pursuant to the SOC Agreement of 1958. It provides for all United States procurement to be accomplished by the host French government and that the policy and procedures outlined therein will govern, and are limited to, the operation of the Line of Communications across France with respect to the procurement of supplies, services and facilities from the French economy.[43]

(3) Pleven-Pawley Agreements of 1952.[44] This Exchange of Letters permitted certain exceptions to the procurement procedures outlined in the LOC Procurement Procedures Agreement of 1950. The exceptions permit the United States military forces to make direct purchases from firms or individuals in France up to an amount of $10,000 for supplies and services and up to $50,000 for minor construction, maintenance and repairs and construction material.[45]

(4) Agreement Regarding Operating Procedures for the French-Americal Fiscal Liaison Office of 1959, referred to as the SOC/FAFLO Agreement.[46] This agreement superseded the LOC/FAFLO Agreement of 1950 which established the French-American Fiscal Liaison Office (FAFLO). The function of FAFLO is to effect financial settlement with France for expendi-

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cited as USACOMZEUR PAM.]. As in all later instances where this pamphlet is cited as the basis of the comment made by the author, the material set forth herein is confined to that information which has been released in an unclassified source concerning international agreements which are classified for reasons of national security.

[42] Agreement Relating to the Procurement of Supplies, Services and Facilities from the French Economy for Operation of the Line of Communications Across France, 14 Dec. 1950, at HQ USACOMZEUR [hereafter cited as LOC Procurement Procedures Agreement].

[43] USACOMZEUR PAM., para. 2b (1962).

[44] Exchange of notes between Monsieur Rene Plevin, Minister National Defense, France, and Mr. William D. Pawley, Special Asst. to U. S. Secretary of Defense, 19, 22, 23, 24, and 26 April 1952, on file at HQ USACOMZEUR.

[45] USACOMZEUR PAM., para. 2b (1962).

[46] Agreement Regarding Operating Procedures for the French-American Fiscal Liaison Office, 21 Jan. 1959, on file at HQ USACOMZEUR [hereafter cited as SOC/FAFLO Agreement].

tures made by French authorities in connection with the System of Communications. Both this agreement and the LOC Procurement Procedures Agreement, by virtue of interpretation and understanding between the two governments, are equally applicable to United States Army, Navy, and Air Force procurement for the System of Communications in France.[47]

(5) NATO Status of Forces Agreement. As stated previously,[48] this agreement provides that goods which are required from local sources for the subsistence of a force or civilian component shall normally be purchased through the authorities which purchase such goods for the armed services of the host state.[49] This Agreement further provides that a force may import free of duty the equipment for the force and reasonable quantities of provisions, supplies and other goods for the exclusive use of the military force.[50]

(6) Construction Procedures Agreement of 1952.[51] This agreement prescribes procedures to be used in regard to construction in France accomplished by the United States military. It further provides the system of procurement to be followed by United States military procurement activities in France in placing contracts with French contractors.[52]

(7) Offshore Procurement Bilateral Agreement of 1953 (OSP).[53] This agreement, one of the many bilateral arrangements discussed previously,[54] precribes that items procured under the Offshore Procurement Program include all types of materials, services, supplies and equipment appropriate for United States military procurement which may be required either for the United States aid programs or for the United States military forces.[55] It provides that it is not applicable to procurement covered by separate special agreements,[56] and that the United States procure-

[47] USACOMZEUR PAM., para. 2c.
[48] See note 36 *supra* and accompanying text.
[49] NATO SOFA art. 2, para. 2.
[50] NATO SOFA art. 11, para. 4.
[51] Agreement Regarding Procedures Applicable to Construction by the U. S. Forces in Metropolitan France, 13 May 1952, on file at HQ USACOMZEUR [hereafter referred to as Construction Procedures Agreement of 1952].
[52] USACOMZEUR PAM., para. 2e.
[53] French Memo of Understanding of 1953, para. 2.
[54] See notes 19–35 *supra* and accompanying text.
[55] French Memo of Understanding of 1953, para. 2.
[56] *Ibid.*

ment officers may contract directly with the French government, individuals, firms or other legal entities by whichever method is deemed more suitable by the United States in each case.[57]

(8) French-United States Working Group Agreement of 1958.[58] The discussion contained above regarding the various agreements affecting United States offshore procurement in France illustrates an example of the conflicts which arise when there exists a great number and variety of international agreements all touching on the subject of procurement by the United States in a particular foreign country. The French-United States Working Group Agreement of 1958 resulted from the attendant confusion existing because of this situation. It was specifically negotiated due to certain French objections to the contention of the United States military that the OSP bilateral agreement extended to all procurement in France and that paragraphs 4[59] and 5[60] permitted United States contracting officers to contract directly with French firms or individuals rather than proceeding through French authorities pursuant to the provisions of some of the other agreements discussed above.

It was the purpose of the French-United States Working Group Agreement to remove most of the inconsistencies and conflicts created by the multitude of international agreements in force between the two countries. To this end certain specific procurement practices were recognized as henceforth controlling in United States offshore procurement in France. The parties recognized a method of operation whereby the various agreements could be considered divisible—each applying to specific types of procurement.

It has not been contended that this military arrangement, negotiated at the level of French and United States military procurement specialists, supersedes or nullifies such treaty provisions as that contained in the NATO Status of Forces Agreement. Rather, it is an accepted principle of international agreement

[57] French Memo of Understanding of 1953, para. 5.

[58] French-United States Working Group Agreement, 17 Jan. 1958, on file at HQ USACOMZEUR [hereafter referred to as French-US Working Group Agreement].

[59] Paragraph 4 provides that "OSP contracts will be placed and administered by procurement officers of the United States Military departments."

[60] Paragraph 5 provides that "United States procurement officers may contract directly with the French Government, individuals, firms or other legal entities, according to whichever method is deemed more suitable in each case."

interpretation or construction that the subsequent practice of the parties in the performance of such an agreement be given stature and effect in international law to determine the purpose of the international agreement which, as appears from the terms used by the parties, it was intended to serve.[61] This is true even though under national law the negotiators may have in fact exceeded their authority. The French-United States Working Group Agreement of 1958, together with the subsequent acts of both states in effecting procurement under its terms of reference, is merely evidence of the parties' subsequent acts as to the purposes intended by the provisions of the many prior international agreements existing between the two governments.

Under both the terms of the 1958 French-U.S. Working Group Agreement and subsequent practice of both parties, the method by which the United States now effects offshore procurement in France is as follows:

(1) Local Procurement. This is defined as procurement to satisfy the needs of an individual United States military installation situated in France even though requirements of several such installations are consolidated and procured by a central procurement activity located in France.[62] In this instance the United States military contracting officer makes a determination of the desirability of international solicitation, *i.e.*, soliciting firms located both within France and in other countries. If the dollar value is less than $10,000, the contracting officer may contract directly with the vendor.[63] In the event the estimated purchase amount is in excess of $10,000, the contracting officer must solicit and contract with French sources by requesting assistance of the French Central Liaison Mission (FCLM) to solicit and award contracts to any French firms.[64] With respect to sources outside France the contracting officer solicits and contracts directly.[65]

(2) Theater Procurement. This term is defined as procurement by a procuring activity within France for depot stock or for distribution to installations anywhere within the European theater

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[61] See RESTATEMENT, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 150(1)(f) (Proposed Official Draft, 3 May 1962).
[62] French-US Working Group Agreement, § I, para. a.
[63] French-US Working Group Agreement, § II, para. 5.
[64] French-US Working Group Agreement, § III, para. 3.
[65] French-US Working Group Agreement, § II, para. 5.

of operations.[66] This category of procurement is further subdivided as follows:

(a) The contracting officer may procure directly if it is determined that the required supplies or services are for the Military Aid Program,[67] or United States military forces, but are of a type defined as:

> Equipment important from a military standpoint or expensive to manufacture, the manufacturing of which requires complicated technical processes, calls for high money input and requires cooperation between the interested parties; for example, aircraft, aircraft spare parts and repairs, electronic equipment, mine sweepers, etc.[68]

(b) The contracting officer may procure directly for theater depot stock except as further limited below.[69]

(c) When an indefinite quantity[70] or requirement-type[71] contract estimated to exceed $10,000 is contemplated, and the award is to be made to a French contractor for delivery of items to any United States military installation within the theater, a "special" French type of contract will be used.[72]

(d) For fixed quantity contracts[73] in excess of $10,000, with a French contractor for deliveries to one or more installations within France, the procurement will be accomplished through the French Central Liaison Mission.[74]

(e) For fixed quantity contracts with French contractors requiring deliveries to be made both within and outside France, the following will apply. If the deliveries to be made within France account for more than 50 per cent of the total dollar value of the contract and exceed $10,000, this portion of the contract will be processed by the French Central Liaison Mission and the contracting officer will contract directly for those deliveries to be made outside of France. If more than 50 per cent of the con-

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[66] French-US Working Group Agreement, § I, para. b.

[67] Established by 75 Stat. 424 (1961), 22 U.S.C. §§ 2151–407 (1964).

[68] French-US Working Group Agreement, annex II, para. 1.

[69] French-US Working Group Agreement, annex II, para. 2.

[70] This type of contract is described in ASPR § 3–409.3(a) (1 March 1963).

[71] This type of contract is described in ASPR § 3–409.2(a) (1 March 1963).

[72] French-US Working Group Agreement, annex II, para. 3a. However, the details of this procedure have never been established by the parties.

[73] This type of contract is described in ASPR § 3–409.1(a) (1 March 1963).

[74] French-US Working Group Agreement, annex II, para. 3b.

tract dollar value is for deliveries to be made by the French contractor to destinations located outside of France, the contracting officer will award the entire contract on a direct basis.[75]

The fact that the 1958 French-U.S. Working Group Agreement is now a reality does not mean that further conflict does not exist concerning the proper law and procedure to be applied to offshore procurement in France.[76] Although disagreements on the proper procedure to be applied presently do exist and will doubtlessly continue to arise in the future, this analysis of the development of presently used procurement practices in France illustrates the manner in which conflicts regarding the applicable law have been solved when a solution was considered by all parties to be desirable.

2. *Offshore Procurement in the Federal Republic of Germany.*

The second example of the development of offshore procurement concerns procurement by United States military forces located in Germany. In discussing this development it must be remembered that, whereas offshore procurement in France concerns procurement in a country which was an ally of the United States in World War II, offshore procurement in the Federal Republic of Germany is influenced by the fact that at the beginning of the United States military presence in Germany, noncontractual methods of obtaining needed supplies and services from a vanquished enemy were used. Property was merely seized

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[75] French–US Working Group Agreement, annex II, para. 3c.

[76] An example of a still serious disagreement between procurement personnel of the two countries concerns debarring or suspending firms from doing business with the United States government. The United States' position is that it has the right to choose those firms or individuals which it wishes to do business with—that it may in accordance with national laws and regulations choose not to do business with a certain firm debarred by it under the provisions of ASPR § I, pt. 6 (1 March 1963) or other pertinent regulations. The French position in this matter is best illustrated by the remarks of Colonel P. G. G. Deffaux, Chief, Bureau Central Deschats, French Central Liaison Mission, at the Paris Procurement Forum, 14 Dec. 1961. In his speech Colonel Deffaux stated:

> The bidders' lists are established according to French regulation. The listing up is contingent to decisions which may be only cancelled by the French Secretary of Defense. This means that debarment and suspension of contractors by the U. S. Forces can only be taken into consideration by the French higher authorities . . . I insist on the fact that the debarment of a supplier cannot be an [*sic*] unilateral American decision.

or requisitioned from the defeated Germans by the United States for its use and benefit. These actions were not controlled by the German government but rather by the Hague Regulations and the Geneva Conventions.[77]

After hostilities with Germany had ceased, it was again recognized that the government of the host state had a voice in the transition from wartime and occupation requisitioning to the more normal contractual method of obtaining supplies and services for United States military forces residing therein. The so-called Bonn Conventions[78] treated in some details the subject of procurement by allied military forces present in Germany. In 1955 the United States and Germany signed a bilateral agreement regarding offshore procurement, which agreement became effective in 1957.[79] In 1963 new international compacts came into force controlling the presence and activities of United States military forces in the Federal Republic of Germany—the NATO Status of Forces Agreement[80] and the Supplementary Agreement.[81] These two agreements replaced the Bonn Conventions mentioned previously.

Therefore, in regard to present international agreements there are two basic sources of the policies and procedures applicable to offshore procurement in the Federal Republic of Germany: the German Bilateral Agreement of 1957 and the NATO Status of Forces Agreement as implemented by the NATO SOF Supplementary Agreement. As in the case of offshore procurement in France, there are of course certain other administrative executive

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[77] See Best v. United States, 154 Ct. Cl. 827, 292 F.2d 274 (1961); Pauly v. United States, 152 Ct. Cl. 838 (1961). Detailed requisition procedures presently used in West Berlin are contained in UPP § XXXI, pt. 1 (Change No. 12, June 1964).

[78] Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, 23 Oct. 1954 [1955] 4 U.S.T. & O.I.A. 4278, T.I.A.S. No. 3425; Convention on the Presence of Foreign Forces in the Federal Republic of Germany, 23 Oct. 1954 [1955] 5 U.S.T. & O.I.A. 5689, T.I.A.S. No. 3426.

[79] See note 22 *supra*.

[80] See note 36 *supra* (effective in Germany in 1963).

[81] Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, 3 Aug. 1959 [1963] 10 U.S.T. & O.I.A. 531, T.I.A.S. No. 5351 [hereafter referred to as NATO SOF Supplementary Agreement].

agreements between the two governments which generally implement these two agreements.[82]

These agreements recognize that offshore procurement by United States military forces may be accomplished by either of two methods. The United States may procure needed supplies or services directly from German firms or individuals or indirectly through the German authorities. However, as contrasted with procurement practice in France, all of the agreements permit the United States to unilaterally determine whether it wishes to use the direct method of contracting with a German firm or whether to request the purchase to be made by or through German authorities.

Even with this flexible procedure, conflicts between two of the international agreements exist. The German Bilateral Agreement of 1957 povides, in regard to direct procurement by the United States, that:

> The United States shall conduct the offshore procurement program in accordance with the laws of the United States governing military procurement and the mutual security program. It is also the intent of the United States that the offshore procurement program shall be carried out in the Federal territory in furtherance of the principles of the Mutual Security Act of 1954, the Mutual Defense Assistance Control Act of 1951 as amended, and the Economic Cooperation Agreement between the Federal Republic and the United States, signed at Bonn on 15 Dec. 1949 as amended.[83]

However, the NATO SOF Supplementary Agreement provides that:

> Where the authorities of a force or of a civilian component procure goods and services direct,
>
> (a) they may apply their normal procedure, provided, however, that they respect the principles applying in the Federal Republic regarding public procurement which are reflected in the regulations concerning competition, preferred tenderers, and prices applicable to public contracts.[84]

Thus, the German Bilateral Agreement of 1957 permits the United States to apply its own law governing military procurement without exception while the NATO SOF Supplementary re-

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[82] One of the principal administrative agreements of this type is the Agreement for the Settlement of Disputes Arising out of Direct Procurement, 3 Aug. 1959 [1963] 1 U.S.T. & O.I.A. 689, T.I.A.S. No. 5352 (with amending exchange of notes). This agreement is discussed in part III *infra* regarding disputes arising out of offshore procurement contracts.

[83] German Bilateral Agreement of 1957 art. 4.

[84] NATO SOF Supplementary Agreement art. 47, para. 4.

quires the United States in carrying out direct offshore procurement to respect certain German regulations regarding German public contracts.

If we again apply the rule regarding interpretation of international agreements as discussed previously, *i.e.*, look to the practice of the parties in operating under the agreements, we find that it is the current practice of the United States to apply exclusively its own procurement procedure without regard to German regulations.[85] If the United States complies with the German regulations specified in article 47 of the NATO SOF Supplementary Agreement it apparently does so only because when it complies with United States law and regulations it incidentally satisfies German requirements. However, this practice has not been assented to by authorities of the Federal Republic of Germany other than by their apparent acquiescence in United States current procurement practices. Perhaps the future will bring further clarification of this apparent inconsistency in the language of the two agreements.

Indirect procurement by the United States is covered by the German Bilateral Agreement of 1957. Article 9 of the agreement provides that:

> It is understood that United States Contracting Officers will contract directly with individuals, firms or other legal entities in the Federal Territory *or with the Government of the Federal Republic* in accordance with the contracting officer's judgment. [Emphasis added.]

A model contract[86] was agreed upon between the two governments to be used when the United States chose to contract with the Federal Republic of Germany. The United States would contract directly with the Federal Republic of Germany for certain needed supplies or services. The German government could subcontract with a German supplier under its own national laws and regula-

[85] A possible exception exists in regard to the German regulations applicable to public contracts. Even before the effective date of the NATO SOF Supplementary Agreement the United States has inserted a clause (UPP § 7–104.76 (Change No. 12, June 1964)) in all its contracts with German firms requiring the contractor to warrant that its prices are not in excess of the prices allowed under price control laws and regulations of the German government. If the contract prices are in excess of such allowable prices, through error or otherwise, they shall be correspondingly reduced. Contracts with German firms are normally audited by a price control office of the German government to determine compliance with these laws and regulations.

[86] This Model Contract form is published as Headquarters, United States Army, Europe, AE Forms 3164A through D.

tions but the German government was itself contractually obligated to provide what was required by its contract with the United States. The United States did not look to the German firm actually supplying the item or service and did not in any way dictate that firm's method of operation.

The NATO SOF Supplementary Agreement also provides for a form of indirect procurement,[87] but it rejects the theory of a government-to-government contract between the United States and the Federal Republic of Germany. Instead, the German authorities, must be informed of the requirements of the United States military forces. The German authorities then conclude contracts for these requirements with German suppliers in accordance with "German legal and administrative provisions governing contracts."[88] However, the German government in this instance is not itself contractually obligated to the United States to furnish the desired supplies or services. Although provision is contained in the NATO SOF Supplementary Agreement for implementing administrative agreements regarding this method of indirect procurement,[89] as of the date of this writing none have been executed. Further, both countries have avoided the use of indirect procurement under the provisions of either agreement. Thus, until it appears desirable to utilize the indirect procurement method for obtaining supplies and services in Germany, it appears unlikely that this inconsistency will be clarified.

As in France, special provisions govern construction by the United States in Germany.[90] These agreements include detailed

[87] NATO SOF Supplementary Agreement art. 47, para. 5.

[88] *Ibid.*

[89] See NATO SOF Supplementary Agreement art. 47, para. 5(g).

[90] See article 49, NATO SOF Supplement Agreement; Memorandum of Understanding between the United States Forces and the Federal Ministry of Finance concerning the Performance of the Construction Projects of the United States Forces by the German Governmental Construction Agency, 1 Feb. 1954, in UPP § 31, annex A (Change No. 6, 15 Sept. 1960); Memorandum of Understanding between the United States Forces in West Berlin and the Senator of Finance, City of Berlin, concerning the Performance of the Construction Projects in West Berlin of the United States Forces by the German Construction Agency, 1 Dec. 1955, in UPP § 31, annex C (Change No. 5, 1 June 1960); Agreement concerning Fixed Price/Cost Reimbursement Architect-Engineer-Construction Basic Contract, 27 Oct. 1956, as modified 23 Oct. 1961, and by Exchange of Letters, 8 Aug. 1956 and 27 Oct. 1956, in UPP § 21, annex D (Change No. 9, April 1962).

Since article 49, NATO SOF Supplementary Agreement, also contemplates

instructions and procedures pertaining to construction contracts or construction projects accomplished by the military forces themselves.

From the foregoing discussion it can be observed that the rules governing the accomplishment of offshore procurement come from a variety of sources. Yet there is detailed order in the procedures employed, and rules have evolved in spite of the conflicts discussed. Offshore procurement is a controlled activity with definite guidelines prescribed.

III. DISPUTES

The previous discussion of offshore procurement has generally been concerned with the sources of the law and procedure for effecting contracts overseas. Once such a contract has been awarded and is being administered, the attorney responsible for advising the cognizant contracting agency must be aware of the remedies available to the foreign conrtactor—even the United States itself—in the event that a dispute arises between the parties during performance of the contract.

It has been noted that provision has been made in certain countries for use of the government-to-government type contract.[91] Although such a procedure is rarely used, if a dispute does result, it must be recognized that from a practical view, the only remedy available lies in diplomatic negotiation between the two governments concerned. Also, in those instances where offshore procurement of supplies or services are procured by the host nation

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additional special administrative agreements between the United States and the Federal Republic of Germany, caution must be exercised to coordinate any legal problems regarding construction offshore contracts with the authorities of the United States military in Germany having responsibility for construction procurement in order to insure the use of current procedures.

[91] Such contracts have been provided for in the Bilateral Agreements between the United States and Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Spain, Turkey, United Kingdom and Yugoslavia. Model contract forms for these countries are published by Headquarters, United States Army, Europe, and are listed in UPP app. A 203.2 a-m. (Change 3, 15 March 1959). Standard clauses and forms have been agreed to by the United States and each of these countries for use in government-to-government contracts. The agreed standard form is used in the particular country regardless of the amount involved and the source of appropriated dollar funds used.

on behalf of the United States, any suit arising out of the contract between the host government and the supplier is generally settled in the courts of the host country.[92]

The material in this part is primarily concerned with disputes arising out of contracts between the United States and foreign contractors which are not governmental entities. From this discussion it will be observed that the *de facto* remedies[93] available in the resolution of disputes, and which afford the parties a hearing to present their views of the disputes,[94] are: (1) contractually stipulated disputes procedures; (2) suit in a United States court of competent jurisdiction; and (3) suit in a foreign court. Each of these is discussed in detail below.

A. *CONTRACT DISPUTES PROCEDURE*

The Armed Services Procurement Regulation provides that all Department of Defense contracts shall contain a clause allowing appeal by a contractor to the Armed Services Board of Contract Appeals (ASBCA) in those instances where the contractor disagrees with the decision of the United States contracting officer rendered in a dispute arising out of the contract,[95] or a clause authorizing an appeal to an intermediate board of contract appeals located in the overseas area where the contract is being per-

[92] In Germany, under articles 44 and 47, NATO SOF Supplementary Agreement, the suit is brought in the German courts with the Federal Republic of Germany representing the interests of the Unitd States. The United States agrees to reimburse the German government for any expenses arising out of such a suit.

[93] The *de facto* remedies used by the contractor may include a remedy in addition to those either recognized by United States law or provide for in international agreements between the United States and the contractor's government. An example is where the United States is sued in a foreign court in a situation where it has not consented to be sued and has no legislation authorizing payment of any resulting judgment rendered against it.

[94] A foreign contractor may protest by letter to the Comptroller General as may an American contractor, but no hearing is afforded the parties.

[95] See ASPR § 7-103.12(a) (Rev. 12, 1 April 1966). Under this clause any dispute involving a question of fact arising under the contract which is not disposed of by agreement is decided by the United States Contracting Officer who reduces his decision to writing and furnishes a copy of it to the contractor. The decision of the contracting officer is final and conclusive unless, within 30 days from the date of receipt of such a copy, the contractor mails or otherwise furnishes to the contracting officer a written appeal.

formed.[96] In accordance with procedures promulgated by each of the armed services, the clause allowing an intermediate appeal to a board in the overseas area may provide that board decisions may be final and conclusive upon the parties, to the extent permitted by law, when the amount involved in the appeal is $50,000 or less.[97]

The implementation of this authorization by the individual services varies. The Army authorizes appeal boards to be established by the senior Army commander or Head of Procuring Activity in Alaska, the Caribbean, Europe, Hawaii and Japan.[98] These intermediate boards hear and decide any appeal arising from a dispute concerning any offshore contract awarded and administered in their area of responsibility. If the amount in dispute is $50,000 or less, the decision of such a board is final except on a question of law.[99] If the amount in dispute is in excess of $50,000, the contractor may appeal the decision of the intermediate board to the ASBCA.

The Air Force has authorized intermediate boards in only two foreign areas. Both the Commander in Chief, United States Air Force, Europe, located in Germany, and the Commander in Chief, Strategic Air Comand, Spain, may establish an intermediate board of contract appeals for disputes arising out of contracts awarded and administered in their areas of responsibility.[100] Where the dispute involves an amount of $25,000 or less, the appeal will be heard by the intermediate board and its decision will be final except on a question of law. All disputes involving an amount in excess of $25,000 or disputes arising in overseas areas other than in Europe, where the two boards are now authorized, must be heard directly by the ASBCA.[101]

The Navy has established no intermediate boards of contract appeals, and thus all appeals from disputes arising in offshore Navy contracts must be processed by the ASBCA pursuant to the clause contained in such contracts.

The primary reason for establishing intermediate boards is to afford a local remedy to the foreign contractor. This reason is

[96] ASPR § 7-103.12(c) (Rev. 2, 15 Aug. 1963).
[97] *Ibid.*
[98] See APP §§ 7-103.12 and 1-201.54 (1965).
[99] APP § 7-103.12 (1965).
[100] AFPI § 7-4205.8 (Rev. 2, 17 Jan. 1961).
[101] *Ibid.*

particularly important when the dispute involves a small amount of money or the contractor has a small business.[102] One difficulty in the procedure, however, has been in obtaining the foreign contractor's acceptance of a disputes procedure whereby the ultimate decision is made unilaterally by the government of the same nation which is a party to the contract. Historically, foreign contractors have argued that such a procedure deprives them of rights guaranteed by their own national law.[103] However, as foreign contractors have become more familiar with the operation of the disputes procedure, and since intermediate boards have established their own reputation for fairness and impartiality in such disputes, foreign contractors have generally come to accept this procedure without violent dissent.

A more serious difficulty arises in connection with the recognition of the contract disputes procedure by the courts of the foreign countries where such contracts are performed. Past opinions of certain foreign law experts have concluded that such a procedure is illegal in a particular foreign country under its national laws as being against public policy.[104] Foreign courts have refused to dismiss a suit filed against the United States even though the contractually stipulated "Disputes" clause is raised as a bar to

[102] See Leonard, *The United States As a Litigant in Foreign Courts*, AM. SOC'Y INT'L L. 1958 PROCEEDINGS 95, 102.

[103] See Nissan Motor Co., FEBCA No. 88, 28 April 1954 (Army Board in Japan). Here the Japanese contractor contended that the finality of the decision under the disputes clause deprived him of a right granted by the Constitution of Japan in that it ousted the jurisdiction of the courts, and thus rendered the disputes clause void as against public policy in Japan. He further claimed that any redetermination of the contract price under the price redetermination clause of the contract is invalid as this also is a matter for a court of competent jurisdiction to decide. The Far East Board of Contract Appeals dismissed these contentions on the basis that its authority to act is limited to the provisions of the disputes clause and must concern a written decision of a factual dispute determined unilaterally by the United States contracting officer where the parties fail to agree. The power of the Board to hear and determine the issue as to its legality in determining this dispute was not a part of the decision previously rendered by the contracting officer.

[104] See Opinion by Dr. Heinrich Lietzmann, Essen, Germany, prepared at the request of the United States Attorney General, attached to Attorney General Letter to The Judge Advocate General, Dep't of Army, subject: Foreign Litigation—General D. J. No. 163-012, 1 Aug. 1961. Dr. Lietzmann points out that:

"The [disputes] clause pertains exclusively to questions of fact not of questions of law. Since the clause does not appear to aim to bar court action on questions of law by submitting them to arbitration, it cannot be regarded as an arbitration agreement. Even if the provision were regarded as an

such an action.[105] The existence of the "Disputes" clause in a foreign contract has even been asserted as a bar to jurisdiction by a foreign court through the plea of a foreign contractor, when sued by the United States in that foreign court.[106]

There appear to be two basic objections so far raised by foreign courts and foreign law experts against the use of contract "Disputes" clause as an exclusive remedy to decide disagreements

arbitration agreement, the other party could challenge the appointment of the arbitrator; all the arbitrators i.e. the contracting office, the head of the Department, his representative or the Board of Contract Appeals appointed by the Army to decide the dispute appear to be a party to the proceedings since they all belong to the Army. A decision by an arbitrator who is a party to the proceedings would never be recognized in a German court. A German court would declare such [a] clause null and void [as] being against public policy."

[105] See I.R.S.A., Ltd. v. United States, Italian Court of Cassation, United Sections, 31 Jan. 1963. In this case the United States had asserted the stipulated disputes clause as a bar to the jurisdiction of the Italian courts. The court held:

"Referring to clause 6 of the contract, the judgment appealed from suggests that the settlement of disputes should have been conferred by the contract upon three arbitrators, members of the American Armed Forces and Civil Administration, and concludes that clause 6 of the contract is voidable under Art. 2 of the [Italian] Code of Civil Procedure. In reality this kind of clause, by conferring jurisdiction upon one of the contracting parties, would lead to denying jurisdiction to the regular courts. It is obvious that the underlying principle would violate one of the fundamental concepts of the Italian public law in a more serious manner than would be conferring of judicial authority upon foreign arbitrators. Moreover, this is expressly forbidden by the quoted article of the Code of Civil Procedure. Hence, agreements conferring exclusive jurisdiction upon one of the parties to a dispute are null and void as a matter of public policy."

[106] See United States v. Scheupenpflug, 4th Civil Chamber of the "Landgericht" (District Court) at Regensburg, Germany (1961). In this case the defendant, a German firm, had held a contract with the United States subsequently terminated for default. The United States then repurchased the services previously included in the defaulted contract and sued the defaulted contractor to collect all excess costs occasioned by the repurchase action. The firm pleaded in defense that the German court was without jurisdiction due to the existence of the disputes clause contained in the contract which conferred jurisdiction on certain United States Army personnel to hear and decide all disputes of fact arising out of the performance of the contract. The court held that it had jurisdiction of the suit regardless of the existence of the "Disputes" clause, stating:

"It is true that para. 15 of the 'General Sale Terms and Conditions' provided that all disputes arising under this contract shall be decided by the contracting officer or the head of his department, respectively. Whether this provision constitutes an arbitration clause within the purview of sec. 1025 of the [German] Code of Civil Procedure need not be decided. Even if it were regarded as an arbitration clause, it would be ineffective in law."

between the parties to the contract. First, the clause itself appears to limit its jurisdiction to only those disputes concerning a question of fact.[107] Thus foreign courts find no bar to their consideration of a dispute which they characterize as a question of law. The second objection concerns those designated to hear and decide any resulting dispute under the clause. It sometimes appears unconscionable for the court to sanction any procedure whereby disputes will be decided only by personnel directly employed by the same government which is a party to the contract.[108]

Although at first glance the disputes clause may therefore appear as an unrecognized remedy by the contractor's government or courts, to resolve differences between the parties to an offshore contract, provisions of certain international agreements must first be considered before a final conclusion is reached in this regard. Provisions of the bilateral agreements negotiated with Belgium, Denmark, France, Germany, United Kingdom, Italy, Luxemburg, The Netherlands, Norway, Spain, Turkey, and Yugoslavia all offer varying degrees of protection against suits in the courts of these countries concerning disputes arising out of offshore pro-

[107] The "Disputes" clauses authorized for use in offshore contracts are based on those set out in ASPR § 7-103.12(*b*) (Rev. 2, 15 Aug. 1963). The two authorized clauses both provide in pertinent part as follows:

"(a) Except as otherwise provided in this contract, any dispute concerning a *question of fact* arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal . . . . The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive to the extent permitted by *United States law* . . . .

"(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; *provided*, that *nothing in this contract shall be construed as making final the decision* of any administrative official, representative or board on a *question of law*." (Emphasis added.)

As noted the clause provides that any decision made under it shall be final "to the extent permitted by United States law." But this provision appears only to relate to decisions regarding "a dispute concerning a question of fact arising under the contract." The clause does not provide that a decision involving a question of law shall be final unless changed by United States law. Rather it excludes questions of law from its effect.

[108] See the discussion of the language used by some of the foreign law experts and foreign courts in this regard contained in notes 104-06 *supra*.

curement.[109] These agreements specify that offshore procurement will be conducted in accordance with United States law governing military procurement.[110] Although the contract "Disputes" clause is not specifically mentioned in these agreements, the clause must be inserted in offshore contracts pursuant to provisions of ASPR,[111] which regulation has the force and effect of a federal statute.[112]

In our relations with the Federal Republic of Germany more recent agreements consider this problem in even greater detail. The NATO SOF Supplementary Agreement provides that disputes arising from direct procurement by the United States in Germany shall be settled by German courts or by an independent arbitration tribual.[113] However, article 44 of this agreement also recognizes that any bilateral agreements between Germany and individual states will take precedence over the foregoing provision.[114]

During the negotiation of article 44 of the NATO SOF Supplementary Agreement, the position of the German authorities was that a German contractor must have a remedy in German courts in contract disputes with procurement agencies of the United States military forces.[115] The United States position was that its procurement procedures and policies did not allow settlement of such disputes in foreign courts or by arbitration.[116] Due to this impasse the two governments agreed to a conciliation procedure which would be available to the German contractor.[117] This agreement was formalized in a special bilateral agreement[118] imple-

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[109] See the discussion of these agreements in part II, notes 32–35 *supra* and accompanying text.

[110] For a general discussion of the agreements see note 32 *supra* and accompanying text.

[111] See ASPR § 7–103.12 (Rev. 12, 1 April 1966).

[112] G. L. Christian & Associates v. United States, 160 Ct. Cl. 1, 320 F.2d 345 (1963), *cert. denied*, 375 U.S. 954 (1964).

[113] NATO SOF Supplementary Agreement art. 44, para. 6(*a*).

[114] NATO SOF Supplementary Agreement art. 44, para. 6(*b*).

[115] See Department of State Memorandum, subject: Negotiating History Concerning the Settlement of Disputes Agreement with the Federal Republic of Germany, 21 May 1965.

[116] *Ibid.*

[117] The nature, effect and use of a conciliation procedure in offshore procurement is more fully discussed in D, *infra*, of this part.

[118] Agreement on the Settlement of Disputes Arising out of Direct Procurement, 3 Aug. 1959 [1963] 1 U.S.T. & O.I.A. 689, T.I.A.S. No. 5352 (with amending exchange of notes) [referred to as German Agreement on disputes].

menting article 44 of the NATO SOF Supplement and became effective 1 July 1963, the same date as the NATO SOF Supplementary Agreement.

Article 3 of the German Agreement on Disputes provides that "Disputes shall be settled in accordance with the provisions specified in the contract signed by the contracting parties." Although one of the parties may request conciliation under the agreement, it should be noted that the quoted language of article 3 is a formal recognition by the German government of the validity of the "Disputes" clause now contained in all offshore contracts. Even where conciliation is requested, such proceedings shall not prejudice any rights to which the parties involved are entitled under the contract in connection with the settlement of disputes.[119] Further, the conciliation commission may only submit recommendations for the settlement of a dispute—not a binding decision.[120] In view of this agreement it is probable that prior opinions contending that the contractually stipulated "Disputes" clause is invalid under German national law are of doubtful validity today.[121] Therefore, when a determination is being sought whether the disputes clause in offshore contracts is valid in a particular foreign country, applicable international agreements between the United States and that country concerning offshore procurement must be closely examined before reaching any conclusion.

B. *SUIT IN UNITED STATES COURTS*

As noted in the previous discussion of the "Disputes" clause as a remedy, the various boards of contract appeals may not make final decisions regarding questions of law.[122] The normal judicial remedy of a private contractor under a contract with the United States is a suit in the United States Court of Claims or in a United States district court under the Tucker Act.[123] This remedy is

[119] German Agreement on Disputes art. 4, para. 2(*c*).

[120] German Agreement on Disputes art. 4, para. 2(*b*).

[121] See, *e.g.*, Opinion of Dr. Heinrich Lietzman, discussed in note 104 *supra*.

[122] This clause is set forth in ASPR § 7-103.12(*b*) (Rev. 2, 15 Aug. 1963) and discussed in note 107 *supra*.

[123] See 28 U.S.C. §§ 1346(a)(2), 1491 (1964). Jurisdiction is conferred upon the Court of Claims to hear and determine suits "founded upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." The United States district courts have concurrent jurisdiction with the Court of Claims over such suits where the amount involved does not exceed $10,000.

available to the foreign contractor under an offshore contract and has often been used in the past.[124] However, not only is the use of this remedy sometimes a hardship on the small contractor asserting a small claim, but he must pass the test of reciprocity established in section 2502 of Title 28, United States Code, which provides as follows:

> Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the Court of Claims if the subject matter is otherwise within such court's jurisdiction.

Under this section an alien suing the United States in the Court of Claims has the burden of showing, as a condition precedent to jurisdiction, that the alien's sovereign allows United States citizens to prosecute claims against such sovereign.[125] Where the evidence fails to show this condition precedent, it fails to establish the alien's right to sue in the Court of Claims and his suit will be dismissed.[126] However, this section does not require that the scope of the actions for which respective countries render themselves to suit be coextensively identical and in *pari materia*.[127] Once the alien is in court, the bar is down. He may not, for instance, be denied a procedural benefit such as discovery merely because there is no discovery against the Crown in his country.[128] In the case of *Nippon Hodo v. United States*[129] the foreign contractor satisfied the statutory requirement merely through submission of a deposition by a Japanese attorney stating that United States nationals were permitted to prosecute actions against the Japanese government. In view of this decision the burden of proof required by the statute may not be such a heavy burden to bear.

C. *SUIT IN FOREIGN COURTS*

Those whose legal training and experience has been generally

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[124] See the remarks of Mr. Leonard, formerly with the Dep't of Justice, contained in Leonard, *The United States as a Litigant in Foreign Courts*, AM. SOC'Y INT'L L. 1958 PROCEEDINGS 95, 101. Mr. Leonard disclosed that in 1958 it was estimated that there were 30 to 40 such cases pending in the Court of Claims.

[125] Aktiebolaget Imo-Industri v. United States, 101 Ct. Cl. 483, 54 F. Supp. 844 (1944).

[126] *Ibid.*

[127] Nippon Hodo Co. v. United States, 152 Ct. Cl. 190, 285 F.2d 766 (1961).

[128] See Pollen v. United States, 85 Ct. Cl. 673 (1937).

[129] 152 Ct. Cl. 190, 285 F.2d 766 (1961).

limited to Anglo-American institutions frequently seek to equate any analysis of choice of law or conflicts of law with common law or American statutory equivalents. Yet study of those principles of law applicable to offshore contracts must of necessity consider, or at least anticipate, what courts of the countries in which these contracts are awarded and performed will do under their own legal codes and systems when presented with a dispute arising out of such a contract. For it is a matter of unqualified fact that some disputes arising out of offshore contracts eventually find their way into foreign tribunals, although most are litigated in the boards of contract appeals and in the United States Court of Claims. It is not always the foreign contractor who resorts to the courts of his country. Sometimes the United States will voluntarily subject itself to a foreign court's jurisdiction in order to protect certain rights it has under a particular offshore contract.[130]

The situation where the United States is involuntarily sued by a foreign firm in a foreign court is of more concern however. When the magnitude of offshore procurement was first envisioned after World War II, the United States sought to protect itself against such a contingency by including certain protective provisions in the Offshore Procurement Bilateral Agreements executed in the early 1950's with many European countries.[131] In Europe a

[130] An example is where the United States seeks to collect excess costs of reprocuring supplies or services due to the default of a contractor. See United States v. Scheuenpflug, 4th Civil Chamber of the "Landgericht" [District Court] at Regensburg, Germany (1961). Sometimes the only practical way for the United States to obtain monetary compensation for a wrong committed by the contractor is through a suit filed in the courts of the contractor's country.

[131] See provisions of the following agreements:

Belgium: Belgium Bilateral Agreement of 1954 art. 13. Under this article the United States is protected from suits or other legal action in Belgium which may arise out of offshore procurement contracts.

Denmark: Danish Bilateral Agreement of 1954 para. 10(m). Under this provision Denmark considers the United States to be protected against suits or legal process or other legal liability in Denmark.

France: French Memo of Understanding of 1953 art. 14. This provision provides that offshore procurement contracts do not have a commercial character as regards the United States government. Offshore contracts are entitled to immunities from jurisdiction and legal process extended by French jurisprudence to foreign governments acting in their sovereign capacity.

Germany: German Bilateral Agreement of 1957 art. 17(b). This provision

special clause is inserted in all contracts with foreign nationals of a country not having such a bilateral agreement, by which the contractor specifically waives his right to bring suit against the United States except as provided in the "Disputes" clause and United States federal statutes.[132] The contractor is further required to indemnify and save harmless the United States against suits brought by subcontractors.[133]

The position taken by the United States in negotiating these bilateral arrangements appeared to run counter to a growing trend by many countries to apply the doctrine of sovereign immunity to public acts of a state *(jure imperii)* and not to private acts *(jure gestionis)*.[134] The United States appeared to favor the restrictive theory of sovereign immunity starting in 1952 as

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provides that the United States shall be immune from German jurisdiction with respect to legal liability which may arise out of an offshore contract.

Italy: Italian Bilateral Agreement of 1954 art. 12(a). Although Italy did not agree to consider the United States immune from jurisdiction of its courts it did agree that it will save the United States harmless from any loss or damage which might be incurred as a result of any such suit.

Luxembourg: Luxembourg Bilateral Agreement of 1955 art. 13. This provision provides that the United States is protected against any suits or other legal action in Luxembourg which may arise from offshore contracts.

Netherlands: Netherlands Bilateral Agreement of 1954 art. 13. This agreement contains the same protection given by Luxembourg.

Norway: Norwegian Memo of Understanding of 1954 art. 13. In this agreement it was understood that in accordance with existing law and practices the United States is protected against suits or legal process.

Spain: Spanish Bilateral Agreement of 1954 art. 13(1)(b). Under this provision the United States is immune from any suits arising out of offshore contracts except as granted by United States law and regulations.

Turkey: Turkish Bilateral Agreement of 1955 art. 13(1)(b). This provision provides that the United States is protected against suits or other actions in Turkey as to any matter which may arise out of an offshore contract.

United Kingdom: British Memo of Understanding of 1952 art. 13. This article provides that in accordance with existing law and practice the United States is protected against suit or legal process or other legal liability in the United Kingdom.

Yugoslavia: Yugoslavia Memo of Understanding of 1954 art. 12(a)(2). Under this article the United States is protected against suits or other legal protection in Yugoslavia as to any matter arising out of offshore contracts.

[132] UPP § 7-104.71 (Change No. 12, June 1964).

[133] *Ibid.*

[134] For a general discussion of the doctrine of sovereign immunity and its effect on offshore contracts see Pasley, *Offshore Procurement*, 18 MIL L. REV. 55, 73 (1962).

evidenced by the well-known Tate Letter.[135] The Tate Letter notified the Department of Justice that henceforth the State Department would follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments involved in suits in United States courts for a grant of recognition of sovereign immunity. Thus, where the act of the foreign sovereign was *jure gestionis*, the State Department would refuse to consider the act as covered by the umbrella of sovereign immunity previously available under the traditional view that all acts, public and private, of a government are immune to suit unless its consent is first obtained.

This change in policy placed the Justice Department in the position of asserting sovereign immunity as a defense when the United States was sued in a foreign court in regard to offshore procurement, while at home commercial transactions of a foreign state were considered *jure gestionis* and therefore not subject to the defense of sovereign immunity.[136] Although the State Department, operating under the Tate Letter, may decide not to make a diplomatic request for the protection of sovereign immunity from suits arising out of offshore contracts, this does not prevent the attorney representing the United States Attorney General in such a suit from making a litigative assertion of immunity under local precedent.[137] And sometimes such a request has been successful.[138]

In examining the various court decisions of foreign countries concerning disputes involving offshore contracts it is found that virtually every form of unit, organization or executive officer, including the President, has been named as party defendant. This includes post exchanges, ships stores, various military units, commanding officers, and procurement officers. However, with few exceptions, courts of one country will look to the laws of another

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[135] Letter from the Acting Legal Advisor of the State Department to the U. S. Attorney General concerning Sovereign Immunity of Foreign Governments, 19 May 1952, printed in 26 DEP'T STATE BULL. 984 (1952) [hereafter referred to as Tate Letter].

[136] For a discussion of the present status of foreign governments when sued in United States courts see Alk, *Absolute Immunity or Enforceable Liability? The Position Before Our Courts of Foreign Sovereigns Engaged in Commercial Activities*, Sec. of Int. & Comp. L. Bull., May 1965, p. 27.

[137] This practice was disclosed in Leonard, *supra* note 124, at 95.

[138] *Ibid.*

to determine the judicial capacity or judicial personality of the individual being sued to determine if he is personally liable for the act complained of.[139] Thus the United States eventually becomes the real party of interest.

How then has the United States fared in these foreign courts when it has been sued for its overseas military operations? Generally, in those countries where the traditional theory of sovereign immunity is still followed, or where provisions of the various international agreements previously discussed[140] are applied, the immunity of the United States from suit has been recognized.[141] In other countries the courts have refused to recog-

[139] *Id.* at 98.

[140] See the provisions of the various Bilateral Agreements and Memoranda of Understanding discussed in note 131 *supra.*

[141] *France:* Raynal v. Toul-Rosieres Officers' Open Mess, Court of Appeals, Nancy, 18 May 1961; United States v. Society Immobiliere des Cites Fleuries Lafayette, Court of Appeals, Paris, 22 Nov. 1961; Enterprise Perignon v. United States, Court of Appeals, Paris, 7 Feb. 1962.

Germany: GEMA v. Kale, Court of Appeals, Frankfurt, 3 Nov. 1960; Wuliger v. Hq. 7480th Supply Group (Spec. Act.), USAF, Labor Court, Wiesbaden, Docket No. 3 A 253/58 (1958); however, in 1962 the German Constitutional Court [Bundesverfassungsgericht] 2 BvM 1/62 had before it a dispute as to whether a foreign sovereign [unidentified] could be made subject to the jurisdiction of a German court in regard to a commercial contract it had with a German national for certain services to be performed at its embassy. In answering the question the court took the view that the principle involved was one of International Public Law. The Attorney General of the Federal Republic of Germany stated that in his opinion sovereign immunity of a foreign state depends upon whether the act giving rise to the dispute was *jure imperii* or *jure gestionis.* The court reviewed the status of the doctrine of sovereign immunity in other countries including the United States (discussed in Reeves, *Absolute or Restricted Immunity of Foreign Sovereign Litigants, What is the Law in the United States?* Sec. of Int. & Comp. L. Bull., May 1964, p. 11). The court concluded that in Germany a foreign sovereign had no immunity from liability on a commercial contract made with a German national and to be performed in Germany. Whether this restricted doctrine of sovereign immunity will now be applied to offshore contracts especially in view of the language of article 17(b) of the 1957 German Bilateral Agreement regarding offshore procurement (note 131 *supra*) remains to be seen.

Greece: Halkropoulous v. United States, Athens Court of First Instance, Decree No. 7354/1959; United States v. Sarris, Athens Court of First Instance, sitting as Appellate Court, Decree No. 17544/1958.

Iceland: Brandsson v. Comdr. of U. S. Defense Forces, Supreme Court of Iceland, 4 Oct. 1961.

Morocco: United States v. Harper, London & Lancashire Insurance Company, Ltd., Court of Appeals, Rabat, 6 June 1961.

nize the defense of sovereign immunity in disputes arising out of offshore contracts characterizing such contracts as resulting from private acts *(jure gestionis)* of the United States.[142]

D. *ARBITRATION AND CONCILIATION*

The foregoing remedies which have been discussed may be familiar to one conversant with the law controlling United States military contracts. However, in recent years foreign contractors and their governments have begun to urge the adoption of two additional, somewhat unfamiliar, remedies for use in resolving disputes arising out of contracts administered overseas. These two remedies, arbitration and conciliation, have been widely used in European countries although enjoying only limited application and recognition in the United States.

This development is the result of many factors. The desire of both the foreign contractor and his government for a remedy divorced from any appearance of favoritism which might result when a dispute is decided solely by the judicial or administrative apparatus of one of the parties to the contract, *i.e.*, the United States, cannot be discounted. A further factor is the desire of foreign contractors for a local forum which can decide completely any dispute arising between it and the United States and a realiza-

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Spain: Marin Cano v. U.S.A.F. 3973d Air Base Group, Court of First Instance, No. 5, Seville, 3 March 1959.

Turkey: Teks Insaat Ve Sanayi, Ltd. v. United States, Court of First Instance, Samsun (1965).

[142] *Austria:* Holonbek v. United States, Supreme Court of Austria, 10 Feb. 1961; Schwary v. United States, Court of Appeals of Vienna, Docket No. 40 Cg 30/65 (1965). In view of the Tate Letter it is interesting to note the Austrian view of the doctrine of sovereign immunity in the United States as stated by the court in this case, as follows: "It is immaterial that under its [United States] laws no distinction is drawn between activities *juri imperii* and *juri gestionis*."

Italy: I.R.S.A. Limited v. United States, Court of Cassation, United Sections, 31 Jan. 1963. This case arose out of an offshore construction contract awarded by United States to an Italian firm in Italy. The cited decision deals with the issue of sovereign immunity which defense was vigorously urged by the United States. At the time of this writing the dispute is being heard on the merits. It is interesting to note that although the Italian Bilateral Agreement of 1954 regarding offshore procurement does not include a provision whereby the Italian government agrees to consider offshore procurement as a sovereign activity, article 12(a) of the Agreement does provide that the Italian government will save the United States government harmless from any loss or damage which might result of any suit brought in an Italian court.

tion that there is a serious question regarding the legality of a decision rendered by a court of the foreign contractor's county. All of these considerations have been instrumental in raising the question of the use of binding arbitration or conciliation as a more acceptable method of settling disputes arising out of offshore contracts.

During negotiation of the NATO SOF Supplementary Agreement and the German Agreement on Disputes, the German representative proposed to the United States that contract disputes be settled under the German judicial arbitration procedures *(Schiedsgerichlswesen)*.[143] This proposal contemplated that the German Court of Arbitration would apply the law agreed to by the parties in the contract. In the absence of such agreement German law would be applied with the use of German procedural rules normally followed by the court.[144] The suggestion for arbitration was rejected by United States military authorities on the basis that United States procurement procedures and policies did not allow such a practice.

Arbitration has been defined as a procedure whereby an independent board of arbitration is selected to settle the difference between the parties. Generally, when a dispute arises, each party selects an arbitrator and the two arbitrators select a third. This panel may interpret and apply the terms of the contract to the specific facts of the dispute and, in theory, it is a substitute for a proceeding in court.[145] The hostility of the Comptroller General to this remedy has yet to be overcome in applying arbitration to Department of Defense offshore contracts. He has consistently held that the United States may not consent to arbitration without the express consent of Congress.[146]

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[143] See Dep't of State Memorandum, subject: Negotiating History Concerning the Settlement of Disputes Agreement with the Federal Republic of Germany, 21 May 1965.

[144] *Ibid.*

[145] See Miller v. Johnstown Traction Co., 167 Pa. Super. 421, 74 A.2d 508 (1950).

[146] See 32 COMP. GEN. 33 (1958). In this case a Department of the Navy offshore contract with a Sewdish firm contained a clause reading as follows: "In case of difficulties arising with regard to the interpretation and execution of this contract, the contracting parties agree hereby to choose each party one arbitrator. These two arbitrators shall choose a third one, and the decision of these three arbitrators shall be binding upon the parties." The arbitration was to take place at Stockholm, Sweden. A dispute arose as to an alleged

The same view has been taken by the United States Attorney General,[147] The Judge Advocate General of the Army,[148] and by early court decisions.[149] But there are other court decisions which contain dicta indicating an apparent trend in the opposite direction.[150] The view has also been expressed that the United States Arbitration Act[151] could be interpreted to apply arbitration to at least some government contracts.[152] In any event it is clear

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unauthorized use by the United States of an unpatented trade secret owned by the firm. The United States refused to arbitrate and the firm brought action in the United States district court for a declaratory judgement including a determination as to arbitration under the quoted contract provision. The suit was dismissed and on appeal (Aktiebolaget Bofors v. United States, 194 F.2d 145 (D.C. Cir. 1951)) the lower court decision was affirmed on the basis that the suit was founded in breach of contract and that under the Tucker Act must be lodged in the Court of Claims as the amount claimed exceeded $10,000. The court stated however that ". . . the alleged refusal of the military and naval authorities of the United States to discuss or arbitrate the question for such unauthorized use had no justification." *Id.* at 149. The Secretary of the Navy then asked the Comptroller General whether the dispute could be submitted to arbitration under the terms of the contract. The Comptroller General reviewed the history of arbitration as a remedy and noted that it is specifically authorized by Congress for certain types of disputes arising out of contracts to which the United States is a party. It was also noted that no similar statutory authorization existed for Department of Defense contracts. Thus the Comptroller General concluded that no authority exists for submission by the Navy Department of the instant contract dispute to arbitration under the provision of the contract; the contractor's remedy for the alleged breach of contract lies in appropriate proceedings in the Court of Claims. See also 8 COMP. GEN. 96 (1928).

[147] See 30 OPS. ATT'Y GEN. 160 (1922).

[148] See DIG. OPS. JAG 1912–1940, § 726(41) (5 May 1919; 14 April 1920).

[149] See United States v. Ames, 24 Fed. Cas. 784 (No. 14,441) (C.C.D. Mass. 1845); McCormick v. United States, 1 Rep. Ct. Cl. No. 199, 36th Cong., 1st Sess. 1, 44 (1860).

[150] See Aktiebolaget Bofors v. United States, 194 F.2d 145, 149 (D.C. Cir. 1951), discussed in note 146 *supra* and Grant Constr. Co. v. United States, 124 Ct. Cl. 202, 109 F. Supp. 245 (1953). In this latter case the court compared the nonstatutory standard "disputes" clause to arbitration and stated: "That is a sort of arbitration, albeit by agents of one party to the contract. Yet it violates as completely as arbitration by third persons, as provided for in the instant contract, would violate, any doctrine that Congress has consented to have decisions made against the Government only in the Court of Claims."

[151] 9 U.S.C. §§ 1–14 (1964). This Act provides for the enforcement of agreements to arbitrate contained in maritime transactions or a contract evidencing a transaction involving commerce.

[152] See Braucher, *Arbitration Under Government Contracts*, 17 LAW & CONTEMP. PROB. 473 (1952); Comment, *Validity of Arbitration Provisions in Federal Procurement Contracts*, 50 YALE L. J. 458 (1941); Pasley, *supra* note 134, at 82–86.

that legislation could be enacted to authorize arbitration of disputes arising under offshore contracts.[153] As to who could or should be the arbitrator, the practicality of using the arbitration facilities of the Permanent Court of Arbitration at the Hague, which is separate from the International Court of Justice, should not be overlooked, at least for contracts with European firms. Although the International Court of Justice hears only cases between states and international entities, the Permanent Court of Arbitration is not so limited. The Secretary General of the Permanent Court of Arbitration has pointed out:

> There is a possibility of bringing before the Court of Arbitration disputes between States and private persons, especially between States and important commercial corporations. It is well known that the International Court of Justice could not be seized of disputes of that kind, since its jurisdition is limited to those between States. It can only treat a difference between a State and a private person or a foreign commercial corporation in case the State itself espouses the respective dispute. For the Court of Arbitration this indirect way is not necessary.[154]

Therefore, although the remedy of arbitration is not of current use in settling offshore contract disputes, it may be of value and should be given consideration in future instances where the remedies now available to the parties prove unacceptable or ineffective.

An additional remedy similar to arbitration is conciliation. The primary difference between the two is that under conciliation no binding decision may be rendered the parties to the dispute; rather only a recommendation is given the parties. Conciliation as a remedy for disagreements arising out of offshore contracts has been authorized for use in Japan[155] and the Federal Republic of

[153] An interesting approach to this problem is to include a provision on the use of arbitration in resolving disputes arising out of offshore contracts in a treaty such as a status of forces agreement, receiving the advice and consent of the United States Senate, or in an executive agreement such as the bilateral agreements concerning procurement discussd in notes 19–35 *supra* and accompanying text. What the opinion of the Comptroller General and the United States courts would be to this solution is unknown. However, it is believed that the Comptroller General in previously discussing the application of arbitration to Department of Defense contracts (see 32 COMP. GEN. 33 (1958), discussed in note 146 *supra*) did not intend to eliminate this approach as a possible alternative to Congressional legislation.

[154] *Permanent Court of Arbitration*, Circular Note of the Sec'y Gen., 3 March 1960 (unofficial translation), in 54 AM. J. INT'L L. 933, 937–39 (1960).

[155] The conciliation procedure used in Japan is based on paragraph 10, art. XVIII of the Treaty of Mutual Cooperation and Security regarding Facilities

Germany.[156] Although the conciliation panel authorized for Japan has been established and is operating, the German panel has not, as of this writing, been operationally established.[157]

Under a conciliation procedure the foreign contractor may request that a disagreement arising out of the offshore contract be submitted to a panel composed of authorities from both the United States and the host country. This panel will then evaluate the basis of the disagreement and may submit recommendations to the parties on the manner in which the dispute should be settled. However, these recommendations are not binding on the parties. The principal effect of this procedure is merely to superimpose another remedy on top of the existing contract disputes clause procedure and the right of a contract party to sue in United States courts. However, a party to such a contract can resort to conciliation when also contemporaneously seeking a remedy through the Board of Contract Appeals or the courts. In fact if a party desires a decision to be made in regard to the contract dispute which is binding against the United States, he must follow the procedure outlined in the stipulated disputes clause found in offshore contracts.[158]

Due to the inherent weakness of any remedial system not furnishing a binding decision in regard to a dispute submitted to it, the conciliation procedure presently appears of doubtful value as a completely effective remedy for the settlement of disagreements arising out of offshore contracts.

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and Areas and the Status of United States Armed Forces in Japan, 19 Jan. 1960 [1960] 2 U.S.T. & O.I.A. 1652, T.I.A.S. No. 4510. This treaty provision provides that: "Disputes arising out of contracts concerning the procurement of materials, supplies, equipment, services and labor by or for the United States armed forces, which are not resolved by the parties to the contract concerned, may be submitted to the Joint Committee for conciliation, provided that the provisions of this paragraph shall not prejudice any right which the parties to the contract may have to file a civil suit."

[156] The German conciliation procedure is authorized in the German Agreement on Disputes.

[157] It may well be that neither German or United States authorities are anxious to expend a great deal of time and effort on a procedure that at best only offers "advice" as to how a contract dispute should be settled especially in view of the apparent lack of requests from German firms for invoking the conciliation procedure authorized by the German Agreement on Disputes.

[158] See the discussion of the relationship between a request for conciliation and the contract disputes clause procedure set forth at notes 119–20 *supra* and accompanying text.

IV. CHOICE OF LAW

This part is primarily concerned with a study of choice-of-law and forum clauses, the law aplicable to an international contract such as the offshore procurement contract where the parties fail to stipulate any such clause, and the methods of proving such law.

An analysis of any government contract quickly reveals that it is a lengthy, involved and detailed instrument. Offshore contracts are no exception—in fact they are often even longer and more detailed than a normal commercial contract. One of the probable reasons for this fact is that the forum which may hear and decide any litigation arising from the contract may be one of several, including a foreign court. The contract must therefore, to the greatest extent possible, be complete and self-sustaining. When one cannot rely upon having the contract litigated in a United States court or having it determined solely on the basis of United States law, one cannot rely on this law to take care of most of the problems with the contract only filling the gaps.

A. *CHOICE OF LAW AND FORUM DETERMINED BY PARTIES*

The most widely used and probably the most important device for preselecting a particular nation's law to govern in an international transaction is the so-called governing law clause.[159] In previous years some offshore contracts included such a provision even specifying that the contract would be governed by the law of the District of Columbia, United States of America;[160] but today, at least in Europe, few, if any, offshore contracts contain a choice-of-law or governing law clause. However, the model government-to-government contracts negotiated as a part of the bilateral arrangements relating to offshore procurement with Belgium, [161] Luxembourg,[162] Spain,[163] and Yugoslavia,[164] all contain provisions requiring the contract to be

[159] In the governing law clause the parties stipulate that body or system of law they desire to be controlling of their rights and responsibilities under the contract.

[160] See Overseas Trading Co., S.A. v. United States, 141 Ct. Cl. 561, 159 F. Supp. 382 (1958) (offshore contract with Belgium contractor).

[161] Belgium Bilateral Agreement of 1954.

[162] Luxembourg Bilateral Agreement of 1954.

[163] Spanish Bilateral Agreement of 1954.

[164] Yugoslavia Memo of Understanding of 1954.

interpreted on the basis of the laws of the United States. Thus it would appear that at least in these countries a choice-of-law clause has been recognized as enforceable when contained in government-to-government contracts.

Early decisions of the United States Supreme Court[165] recognized the right of contracting parties to expressly incorporate into the contract the law which they wish to govern their contractual relations. Other subsequent decisions have cautiously approved of and applied such a clause where the stipulation appears reasonable under all the circumstances.[166] The court, in determining reasonableness, is of course not confined in its judicial inquiry to the contract clause. The private selection is but one element, although a weighty one, in determining the judicial finding of the appropriate law.[167]

It is generally conceded that such a clause will be recognized in most common law and civil law countries, within certain limitations.[168] Choice-of-forum clauses[169] are also relatively common in European countries. The validity of such a clause is as a rule recognized, with the exception relating only to certain narrow matters.[170] In France, Germany, Holland and Belgium the validity

[165] See, *e.g.*, Pritchard v. Norton, 106 U.S. 124 (1882).

[166] See, *e.g.*, Muller & Co. v. Swedish American Line, Ltd., 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955); see generally Pasley, *supra* note 134, at 68–73.

[167] Fricke v. Isbrandtsen Co., 151 F. Supp. 465 (S.D.N.Y., 1957). Here the court refused to enforce a choice-of-law clause contained in a steamship ticket which specified United States law against a German passenger. The English language ticket was issued on a take-it-or-leave-it basis and the passenger purchased it in Germany, probably, said the court, feeling that German law would be applicable. The court did state in dicta that if the passenger had been given a German counterpart of the contract and had understood its terms, the choice of law stipulated would probably be binding on her. As it was, the court's decision was based on German law.

[168] See discussion in Reese, *Power of Parties to Choose Law Governing Their Contract*, AM. SOC'Y INT'L L. 1960 PROCEEDINGS 49, 51, and authorities cited therein.

[169] The normal "Disputes" clause now contained in offshore contracts should not be compared to the accepted choice-of-forum clause as the former states that the decision of the pertinent board of contract appeals is not final on a question of law (ASPR § 7-103.12(b) (Rev. 2, 15 Aug. 1963)). Thus, foreign courts, as well as those in the United States, easily determine that this clause does not prevent them from taking jurisdiction of certain contract disputes.

[170] Detailed indications on the law of the countries represented at the Hague Conference of Private International Law will be found in 1 *Actes et Documents de la neuvieme* 52–62, discussed in van Hecke, *Choice-of-Law*

of a choice-of-forum clause is generally recognized in contractual matters.[171] The country that has the strictest rules in this respect is Italy, where a choice-of-forum clause is declared invalid unless the forum "chosen" is Italian, when one of the parties is an Italian citizen and resident.[172]

As the practices of the many foreign courts vary to some extent, it is considered helpful to set forth a summary of the practices of the courts of certain other countries in which offshore contracts are now or may in the future be awarded and administered.[173]

(1) *Australia.* Australian courts have no doctrinal difficulty in permitting a reference to a governing law clause of the parties' own choosing.[174]

(2) *Canada.* Canadian courts follow other Commonwealth courts in generally enforcing such choice-of-law clauses.[175]

(3) *Denmark.* Danish courts recognize that parties may agree between themselves which law shall be the proper law of the contract, provided the relationship between them contains an international element of some kind which points to that law selected.[176] Further, jurisdiction may be conferred upon or withdrawn from Danish courts by express agreement between the parties.[177]

(4) *France.* In France there are certain types of contracts,

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Provisions in European Contracts, PARKER SCHOOL STUDIES SYMPOSIUM INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 44 (1962).

[171] See van Hecke, *supra* note 170, at 44.

[172] See I.R.S.A. Ltd. v. United States, Court of Cassation, United Sections, 31 Jan. 1963, discussed in note 142 *supra*.

[173] Although not included in this study, a discussion of the validity of such clauses in Latin American contracts is contained in Folsum, *Choice-of-Law Provisions in Latin American Contracts*, PARKER SCHOOL STUDIES SYMPOSIUM INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 54 (1962).

[174] See Vito Food Products, Inc. v. Unus Shipping, Ltd., [1939] A.C. 277 (Austl.), discussed in COWEN, BILATERAL STUDIES, AMERICAN-AUSTRALIAN PRIVATE INTERNATIONAL LAW 109–110 (1963). This decision was rendered by the Judicial Committee of the Privy Council which sits in London and exercises jurisdiction as the final Australian Court of Appeal.

[175] See Westcott v. Alsco Products of Canada Ltd., Ct. of Ontario, 24 D.L.R.2d 281 (Nfld. 1960); discussed in Cowen & de Costa, *The Contractual Forum, A Comparative Study*, 43 CAN. B. REV. 453 (1965).

[176] See discussion of Danish law and practice in PHILIP, BILATERAL STUDIES, AMERICAN-DANISH PRIVATE INTERNATIONAL LAW 36–37 (1957).

[177] DANISH CODE OF PROCEDURE § 247, discussed in PHILIP, *op. cit. supra* note 176, at 25.

such as the so-called "adhesion" contract,[178] where one of the parties has little if any right to choose the law made applicable to the contract. With this exception, if a contract stipulates the applicable law, effect will normally be given to the stipulation, provided there is a reasonable connection between the contract and the law selected by the parties, and that public policy is not contravened.[179]

(5) *Federal Republic of Germany.* It would seem that as provisions of the German Bilateral Agreement of 1957[180] and the NATO SOF Supplementary Agreement[181] both recognize that United States law and procedure will generally apply to offshore contracts, no difficulty should result from the use of a choice-of-law or choice-of-forum clause in Germany.

(6) *Japan.* Where the parties to a contract expressly provide for governing law, that law will generally govern in Japan under article 7(1) of the Japanese Horei;[182] but courts in Japan may be expected to draw a distinction between contracts of parties with equal bargaining power and contracts of "adhesion" where the parties are of unequal standing at the bargaining table.[183]

(7) *United Kingdom.* As in Australia and Canada the courts of Great Britain generally will recognize a choice-of-law clause contained in a contract having an international character.[184]

In such a study as this it must be recognized that the courts are quite naturally jealous of their own jurisdiction and proud of the law they expound. By enlarging their concepts of jurisdiction

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[178] "Adhesion" contracts are generally considered to be those containing standard provisions common to the trade which are incorporated on a take-it-or-leave-it basis. See discussion at note 195 *infra* and accompanying text.

[179] See discussion in DELAUME, BILATERAL STUDIES, AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW 120 (2d ed. 1961).

[180] Art. 4.

[181] Art. 47, para. 4(a).

[182] Law Concerning the Application of Laws, Law No. 10 of 21 June 1898, as amended by Law No. 7 of 1942 and Law No. 223 of 1947. An English translation of this law is contained in EHRENZWEIG, IKEHARA, & JENSEN, BILATERAL STUDIES, AMERICAN-JAPANESE LAW, app. A (1964).

[183] See EHRENZWEIG, IKEHARA, & JENSEN, *op. cit. supra* note 182, at 47–48.

[184] See Hoerter v. Hannover Caoutchour Gutha Percha & Telegraph Works [1893] 10 T.L.R. 103; for a discussion of British Commonwealth case law on agreements selecting the governing law of a contract and the contractual forum, see Cowen & de Costa, *The Contractual Forum, A Comparative Study*, 43 CAN. B. REV. 453 (1965).

and invoking doctrines of local public policy, they frequently succeed in frustrating even the best laid plans to have contractual rights determined and enforced according to another law and in another forum. Even though a court may apply foreign law to a case before it in accordance with a choice-of-law clause, its decision is made on the basis of proof, arguments and reasoning in the legal language of the forum. Thus, in any analysis of choice-of-law clauses selected by the parties, one must always proceed on the premise that the legal language of the forum will govern, regardless of the foreign law chosen by the parties and regardless of the foreign law chosen by the parties and regardless of the foreign language employed in the contract.[185]

There is also a necessary relationship between choice-of-forum and choice-of-law provisions. In the absence of an express choice-of-law clause, the choice of forum will have a very strong presumptive value on the intention of the parties with regard to choice of law.[186] Also, contrary to the practice of courts in the United States, [187] it is well established law in European countries that a contractual relationship is governed by one law only and that law is the law of the country with which the contract is most closely connected and which the parties are presumed to have envisioned.[188] An additional note of caution concerns the fact that not all matters covered in a contract belong to the field of "contract law" proper. A contract often has clauses that cover a subject matter that belongs to another field of law where freedom of choice of law may be nonexistent. The contract may have clauses regarding the passing of title which is sometimes considered a part of the law of property, not of contract, and thus in some countries compulsorily governed by the law of the situs of the equipment or goods. Thus a choice-of-law clause subjecting this feature of the contract to the law of a different sovereign may be held ineffective. [189]

The widespread recognition of choice-of-forum clauses is evi-

[185] See Cheatham, *Internal Law Distinctions in the Conflict of Laws*, 21 CORNELL L. Q. 570 (1936); Lorenzen, *The Qualification, Classification or Characterization Problem in the Conflict of Laws*, 50 YALE L. J. 743 (1941).

[186] See van Hecke, *supra* note 170, at 46.

[187] The practices of United States courts and administrative boards are discussed in B, *infra*, of this part.

[188] See van Hecke, *supra* note 170, at 46.

[189] *Id.* at 44–51.

denced in the draft Convention on the Jurisdiction of the Selected Forum in the Case of International Sale of Goods, prepared by the Hague Conference in 1956.[190] This convention is not in force, but it is indicative of world feeling on this subject. Article 2 of the convention states:

> If the parties to a contract of sale expressly designate a court or courts of one of the Contracting States as having jurisdiction to adjudicate disputes which have arisen or may arise from said contract between the contracting parties, the court thus designated shall have exclusive jurisdiction and any other court shall declare itself without jurisdiction.

Again in 1964 a draft Convention on the General Jurisdiction of Contractual Forums[191] was presented to the tenth session of the Hague Conference on Private International Law. Article I of this convention states:

> In the matters to which this convention applies and under which it prescribes, parties may designate a court or the courts of a contracting state through an agreement selecting a forum for the purpose of deciding controversies which have arisen or may arise among them in connection with a specific legal relation.

To this point the discussion regarding use of such clauses has been primarily concerned with private international contracts where neither party is a government. Yet, although the United States Department of Defense has appeared to lag in a growing trend to use choice-of-law clauses, not all other governmental organizations have been so cautious.

There are instances of contract loan agreements between private foreign borrowers and the former Development Loan Fund (now a part of A.I.D) in which the contract declared that the law of the District of Columbia was applicable.[192] Contracts for supplies or services on file at the World Bank also indicate a varied use of terminology for choice-of-law clauses. The contract, or the rights and obligations of the parties, are said to be "subject to," "governed by," "construed according with" and "deemed for all purposes to have been executed in and in all respects [to] be subject to and construed in accordance with" the laws of a particular

[190] An English translation was published in 5 AM. J. COMP. L. 650 (1956).

[191] The full English language text of this draft convention was published in Cowen & de Costa, *supra* note 184.

[192] See discussion in Broches, *Choice-of-Law Provisions in Contracts With Governments*, PARKER SCHOOL STUDIES SYMPOSIUM INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 64, 69 (1962).

sovereign. In other cases the local law is said to be "the proper law of [the] contract" or the law which governs its "validity and interpretation." The provisions of the Civil Code of a particular sovereign are said to govern "what has not been expressly stipulated in this contract." In another there is the provision that "it is clearly established that the [governments] legislation is the only one applicable to everything in this contract."[193]

In the United Kingdom, the Commonwealth Development Finance Corporation stipulates United Kingdom law in its contracts. International organizations also stipulate the governing law. The International Finance Corporation's contracts stipulate New York law. The European Coal and Steel Community, for most matters, but not all, stipulates local law; the European Investment Bank stipulates the local law of its borrower.[194]

This outline of practices is not intended to prove that such choice-of-law clauses or stipulations are in all cases recognized as valid by most of the judicial bodies sitting throughout the civilized world. But on the other hand, such a widespread practice cannot be said to be futile. Even in view of the varied practices of the courts of the many sovereign nations, as to the legality and effectiveness of such a clause, it is difficult to see how attempted use of any such clause in an offshore procurement contract of the Defense Department can have adverse consequences. Little can be lost, and much, perhaps, gained. Careful use of the tools for preselecting applicable law may thus very well change the outcome in a substantial number of cases.

The obstacle of having such a clause declared invalid on grounds of public policy as being a part of a contract by "adhesion" is not considered unsurmountable. "Adhesion" contracts are normally defined as those containing mandatory standard provisions,[195] a

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[193] For a general discussion of the practices used in contracts on file with the World Bank for the supply of goods and services regarding choice-of-law clauses, see *id.* at 69–72, and Olmstead, *Economic Development Loan Agreements Part I: Public Economic Development Loan Agreements; Choice of Law and Remedy*, 48 CALIF. L. REV. 424, 428 (1960).

[194] Practices of foreign countries and international organizations are discussed in Nurrick, *Choice-of-Law Clauses and International Contracts*, AM. SOC'Y INT'L L. 1960 PROCEEDINGS 56.

[195] Slowly and against much resistance, courts and writers are beginning to recognize and to admit that the law of contracts has ceased to be a unitary set of rules relating to a "bargain" and a "meeting of the minds." It has begun to be recognized that a separate and independent law of contracts is concerned

definition which the offshore contract in some respects certainly fits. Yet, inclusion of a choice-of-law clause in pertinent regulations as an optional clause to be placed in the contract schedule only where desirable and possible, with instructions to specifically draw the contractor's attention to the clause and require him to place his initials after its recitation may be sufficient measures to indicate to a court that, indeed, it was through the free will of the parties that the stipulation of governing law was placed in the contract.[196]

B. *CONFLICTS OF LAW IN ABSENCE OF CHOICE OF LAW*

As observed previously, present offshore contracts seldom contain a choice-of-law clause. In European countries, if the dispute is litigated in a European court, there is little conflict—the law of the country where the contract is performed is applied. However, when the dispute, as we hope it will be, is litigated under the contractually stipulated "Disputes" procedure or in United States courts, a different conclusion results.

1. *Rules Regarding Procedural Matters.*

United States courts are uniform in their decision that on matters of procedure, the law of the forum will apply even though

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primarily with rights and duties which are created by a contract party's mere adhesion to the dictates of the other party rather than by a free bargain and agreement. On the "standardized contract" in general see Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 587 (1933); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS §§ 172, 202, 207a(2) (1962). The term "adhesion contracts" was apparently used in the United States for the first time in Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). It was coined by Raymond Salerlbes as "contract d'adhesion," in De la declaration de valante 229 (1901), to describe those so-called contracts "in which one predominant unilateral will dictates its law to an undetermined multitude rather than to an individual. . . ." Judges have questioned the enforcement of contract stipulations which are part of a contract by adhesion on the basis that the adherent, "having no real choice about the matter, cannot in fairness be said to have joined in a 'choice of law.'" See Siegelmann v. Cunard White Star Ltd., 221 F.2d 189, 206 (2d Cir. 1955) (Frank, J., dissenting). Also see Fricke v. Isbrandtsen Co., 151 F. Supp. 465 (S.D.N.Y. 1957).

[196] This practice would appear to satisfy the dicta contained in the case of Fricke v. Isbrandtsen Co., 151 F. Supp. 465 (S.D.N.Y. 1957), discussed in note 167 *supra*.

on certain substantive matters, foreign law will be used in deciding a dispute under a contract with a foreign supplier performed in a foreign country.[197] Procedural rules to be determined by the forum include the remedies which are available,[198] admissibility of evidence,[199] statutes of limitations on bringing suit,[200] and the necessity and manner of pleading and proving foreign law.[201]

2. *Rules Regarding Substantive Matters.*

In early appeals before the Armed Services Board of Contract Appeals (ASBCA), the Board was confronted with the problem of what law should be applied in determining the rights and liabilities of the parties under offshore contracts where there was no specific contract provision dispositive of the issue involved in the dispute.[202] The first appeal presenting this issue was that of *Vonk's Handelmaatschappij N.V.*[203] This case concerned an assessment for excess costs of repurchase by the United States after the appellant's default. The Board observed that the contract with a Dutch firm was to be performed in Germany and contained no stipulation as to the governing law. After reviewing the United States federal court cases regarding conflict of laws principles applied in similar nongovernment contracts, the Board determined there was no apparent reason why the same rules should not apply to the performance of government contracts outside the United States. Hence the Board adopted the rule that the obligation of a party to mitigate his loss in the recoupment

[197] See Prichard v. Norton, 106 U.S. 124 (1882); Scudder v. The Union National Bank of Chicago, 91 U.S. 406 (1875).

[198] Bank of United States v. Donnally, 33 U.S. (8 Pet.) 361 (1834).

[199] Pritchard v. Norton, 106 U.S. 124 (1882); Scudder v. The Union National Bank of Chicago, 91 U.S. 406 (1875).

[200] Grombach v. Oerlikon Tool & Arms Corp., 276 F.2d 155, 164 (4th Cir. 1960). Here the contract had been executed in Switzerland and was to be performed in New York. The suit for breach of contract was instituted in the United States District Court for the Western District of North Carolina. Under the *lex fori* rule the statute of limitations for contract actions brought in the state of North Carolina was applied by the court. This rule has, however, been subject to criticsm as unfair and unjustified. See EHRENZWEIG, *op. cit. supra* note 195, §§ 161–63.

[201] Panama Electric Ry. Co. v. Moyers, 247 Fed. 19 (5th Cir. 1918).

[202] In 37 COMP. GEN. 485 (1958), the Comptroller General made it clear that concerning offshore contracts, foreign law and custom may not take precedence over the specific terms of the contract or over specific statutory prohibitions.

[203] ASBCA No. 621, 24 Aug. 1950.

of excess costs from a defaulting contractor should be governed by the law of the place of the contract's performance. The Board then, through its own research, found that a particular provision of the German Civil Code appeared applicable to the dispute but held that it made little difference because both the German rule and the American one placed substantially the same obligations on the parties.

The next appeal, that of the *Philippine Sawmill Co.*,[204] concerned liability for certain government property lost at the contractor's working site in the Philippine Islands. The Board observed that:

> The contract is silent as to what law shall govern the rights of the parties. At the time of entry into the basic contract the Philippine Islands were a possession of the United States. Shortly thereafter, on 4 July 1946, . . . the islands became an independent republic and thus no longer under the sovereignty of the United States. This change of sovereignty over the place of performance presents no particular difficulty as the Federal Courts of the United States hold that the law of the place of performance governs in a case involving performance of a non-government contract. There is no apparent reason why the same rule should not apply to the performance of Government contracts outside the United States. . . . The instant contract was entered into and was to be performed entirely within the area of the Philippine Islands. Therefore, the laws of that former possession of the United States, as continued under the Philippine Republic are for application.[205]

The Board then went on to decide the dispute upon the basis of Philippine law.

In a third decision of the ASBCA, *Appeal of Fuji Motors Corp.*,[206] The Board held that Japanese law should apply. In interpreting specific provisions of the contract, such as the one which invoked the cost principles of ASPR, the Board stated that even Japanese business customs, usages and accounting standards should be followed where they did not violate any law or public policy of the United States. However, the Board found there was no Japanese law which provided cost principles or guides applicable to the issues of the dispute. Thus the Board applied United States law in the form of procurement directives disseminated by United States Army procurement agencies located in Japan in rendering its decision.

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[204] ASBCA No. 569, 19 April 1951.
[205] *Ibid.*
[206] ASBCA No. 2117, 12 June 1958, 58–1 B.C.A., para 1817 (1958).

The most recent decision of the ASBCA, regarding an appeal arising out of an offshore contract dispute in which the application of foreign law was discussed, occurred in 1965.[207] This appeal arose out of a dispute regarding a contract for supplying coal to United States forces in Germany. The Board quoting from its earlier decisions again stated that the law of the place of performance governs. However, the Board then proceeded to decide the appeal in favor of the supplier on the basis of United States law, stating that in view of the conflicting interpretations advanced by the attorney representing the United States, it was reluctant to accept appellants' affidavit as conclusive evidence regarding interpretation under German law of the various documents and testimony before the Board.

In summary, the analysis of the few decisions of the Armed Services Board of Contract Appeals appears to indicate that in United States courts and in the Armed Services Board of Contract Appeals the proven law of the place of performance will be used in resolving substantive matters where there does not exist a contractual clause dispositive of the issue involved.

C. *PROOF OF FOREIGN LAW*

As it has been established that foreign law is applicable to offshore contracts under certain circumstances, it is considered important to have some knowledge regarding the rules surrounding the pleading and proof of such law before a United States court or the Armed Services Board of Contract Appeals. It is not the purpose of this section to outline in great detail the appropriate rules but rather to instill an awareness of the problems to be encountered.[208]

Contrary to some European practices,[209] in the United States

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[207] See Shiffahrt-und-Kohlenagentur (Shipping and Coal), ASBCA No. 10219, 13 Aug. 1965, 65–2 B.C.A., para. 5038 (1965).

[208] A detailed general guide for the attorney involved in a lawsuit requiring the application of foreign law is SOMMERICH & BUSCH, FOREIGN LAW, A GUIDE TO PLEADING AND PROOF (1959).

[209] See Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L. J. 1018 (1941). The European legal philosopher Savigny urged that the recognition of froeign legal systems is a corollary to that equality between nationals and foreigners which is demanded by the law of nations. Under the maxim that the court knows the law—*Jura novit curia*—knowledge of the foreign law is imposed as a duty upon the court, regardless of what was pleaded or what was proved by the parties.

foreign law is a fact which must be pleaded and proved. The courts of the United States will not generally take judicial notice of the laws of foreign countries,[210] although at times it appears that an administrative board or court has performed its own research of what in fact is the applicable foreign law.[211] In the *Vonk* case the ASBCA recognized that in the absence of proof of the applicable foreign law, it could not presume the foreign law to be the same as the law of the United States. This proposition was held to be especially true where that foreign law had its origin in the civil law while United States law had its growth from the common law. However, the Board then researched the appropriate German law from the German Civil Code and concluded that, as it appeared to be very similar to the American rule, it would decide the dispute on the basis of American law. Although such exceptions as this decision do exist, it should be recognized that in general, foreign law must be proved. The courts cannot be expected to be learned in all law—foreign as well as American.

Even in those jurisdictions permitting judicial notice of foreign law the party relying upon such law is not relieved from the requirement of pleading the foreign law upon which he intends to rely.[212] If a party fails to plead and prove the foreign law upon which his claim may be compensable, the court or board may dismiss the suit on the basis that the party relying on foreign law has not introduced any proof of the law and thus has failed to make out his case.[213] If the nature of the proof is not sufficiently

[210] Dainese v. Hale, 91 U.S. 13 (1875).

[211] See Philippine Sawmill Co., ASBCA No. 569, 19 April 1951; Vonk's Handelmaatschappij N.V., ASBCA No. 621, 21 Aug. 1950; Southwestern Shipping Corp. v. National City Bank, 11 Misc. 2d 397, 173 N.Y.S.2d 509, *aff'd*, 6 A.D.2d 1036, 178 N.Y.S. 2d 1019 (1958), *rev'd on other ground*, 6 N.Y.2d 454, 190 N.Y.S.2d 352, 160 N.E.2d 836, *cert. denied*, 361 U.S. 895 (1959). In accord with the courts' deference to certain foreign government regulations on currency, judicial notice of such regulations seems to be more readily taken.

[212] See Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397 (1889). In F.A.R. Liquidating v. Brownell, 130 F. Supp. 691, 695 (D. Del. 1955), the court stated: "If foreign law is relied on, it must be pleaded and its substance, at least laid out as a fact." See also Luckett v. Cohen, 145 F. Supp. 155 (S.D.N.Y. 1956).

[213] Cuba R.R. v. Crosby, 222 U.S. 473 (1912); Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956); 37 COMP. GEN. 485 (1958). Such a dismissal has, however, been strongly criticized as causing

convincing when disputed by the contesting party, a court may do as the Armed Services Board of Contract Appeals did in the *Appeal of Schiffahrt und Kohlenagentur*[214] by merely retreating to a position of applying the more familiar law of the forum. However, many American courts have refused to even apply principles of United States law where the law of a country embracing the civil code as contrasted with the Anglo-American concept of common law is obviously applicable.[215]

The foregoing illustrates two important principles: *first*, the danger inherent in not pleading and proving foreign law where one's rights are based thereon; *second*, where foreign law is applicable for resolution of the dispute, the possibility of asserting in defense to the claim, the fact that the burden of proof of such law, as in the case of any fact, is upon the proponent; if he fails in this burden, recovery should be denied. This course of action is considered far more preferable to the blind assenting to the court's action in applying the law of the forum as they see it to determine disposition of the dispute.

How then should foreign law be pleaded and proved? Since foreign law is a fact, the general proposition for which it stands must be stated in the pleading. It is not necessary to plead the evidence of the fact, whether such evidence be embodied in the statutes of the foreign state or in the decisions of its courts. But the fact that a given proposition is the law must be stated, if such fact is essential to a recovery.[216]

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unwarranted injustice. See EHRENZWEIG, *op. cit. supra* note 195, §§ 127, 129. Thus, some courts in recent years have chosen to apply the law of the forum in the absence of adequate proof of foreign law rather than dismissing the suit. See Tidewater Oil Co. v. Waller, 302 F.2d 638 (10th Cir. 1962) which applied "fundamental principles" of Oklahoma state law in the absence of proof of Turkish law, and Louknitsky v. Louknitsky, 123 Cal. App. 2d 406, 266 P.2d 910 (1954), which applied California state community property law in the absence of proof of Chinese law. For a recent general discussion of both trends in treating this troublesome issue see Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom, 347 F.2d 168, 174–75 (5th Cir. 1965).

[214] ASBCA No. 10219, 13 Aug. 1965, 65–2 B.C.A., para. 5038 (1965).

[215] See Lutwak v. United States, 344 U.S. 604 (1953). Here the Court stated that: "It does not seem justifiable to assume what we all know is not true—that French law and our law are the same. Such a view ignores some of the most elementary facts of legal history—the French reception of Roman law, the consequences of the Revolution, and the Napoleonic codification." *Id.* at 621.

[216] Rothschild v. Rio Grande Western Ry. Co., 59 Hun. 454, 455 (N.Y. 1891).

Foreign law itself, depending upon its source, may be proved in a variety of ways. If the law is evidenced by statutes, codes, acts of state or judicial records, which are not officially published, it could be proved by an exemplified copy under the seal of the body whose record it purposed to be. This would be accompanied by the certification of the official in charge of keeping the records that it was a true and correct copy stating the name of the principal officer of the body or tribunal which made or issued the original record, and be a certification from such principal officer of the identity of the official custodian who made the first certification.[217] The documents to be offered could also be proved to be a true copy of the original by a witness who testifies that he had examined and compared the copy with the original. The correctness of the copy could be proved by a certificate of an officer properly authorized by law to give a copy, which certificate is duly authenticated.[218]

If the foreign law is contained in a statute book officially published by the government which made the law, it may be proved by the statute itself.[219] If the statute book is proved to be published by the authority of the foreign state or country, it is admissible without further authentication.[220]

In many if not most disputes, interpretation or explanation of the law is necessary. Where foreign law is involved this may be accomplished by use of testimony of an expert witness versed in the applicable foreign law as well as through evidence of statutes and judicial decision.[221] This so-called expert may be a layman or a jurist of the other country upon a showing of familiarity with those laws. In fact the United States Court of Claims has held that study alone may qualify the witness to testify upon the law with which he has familiarized himself.[222]

Obviously, documents in a language foreign to that used in the

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[217] For a general discussion of proof of foreign law see SOMMERICH & BUSCH, FOREIGN LAW, A GUIDE TO PLEADING AND PROOF, chs. II, VIII (1959).

[218] For a discussion of the use of such certificates see STOREY, CONFLICT OF LAWS § 641 (3d ed. 1876).

[219] Ennis v. Smith, 55 U.S. (14 How.) 398 (1852).

[220] Hecla Powder Co. v. Sigua Iron Co., 157 N.Y. 437 (1899).

[221] Electric Welding Co. v. Prince, 200 Mass. 386, 86 N.E. 947 (1909). In general see Domke, *Expert Testimony in Proof of Foreign Law in American Courts*, 137 N. Y. L. J., 12 March 1957, p. 4; 137 N. Y. L. J., 13 March 1957, p. 4.

[222] Dauphin v. United States, 6 Ct. Cl. 221 (1870).

court or board of the forum should be translated and the sworn translation offered in evidence together with the original foreign document from which it was taken. If it is considered likely that a dispute will exist concerning the accuracy of any portion of the translation, it is advisable to have available at the trial or board hearing the translator or some other person versed in the foreign language to serve as a witness in support of the translation offered in evidence.

On a few occasions discovery procedures have been used to obtain admissions on questions of foreign law and to avoid travel expenses of foreign experts resident abroad by seeking to obtain depositions. The technique of securing the testimony of a qualified expert resident abroad by a deposition has been specifically suggested by an American court.[223] The court in passing upon the sufficiency of the complaint held that the law of the foreign country must be pleaded and proved as a fact and suggested that one of three courses be followed: (a) stipulation; (b) experts called to testify; or (c) "depositions of persons qualified to testify as to the foreign law may be taken as provided by the Federal Rules of Civil Procedure."[224] A similar procedure as that contained in the *Federal Rules of Civil Procedure* is found in the rules for processing appeals before the Armed Services Board of Contract Appeals.[225]

Although attorneys concerned with offshore contracts are principally interested in those rules applicable to proving the foreign law of the place of performance in a United States court or administrative board, the situation may arise where it is necessary to assert and prove United States law regarding a contractual dispute lodged in a foreign tribunal. It is not within the scope of this study to analyze in a detailed fashion the rules of the various foreign countries in which offshore contracts are awarded and performed regarding the proper method of pleading and proving foreign law. But the reader is advised to read the

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[223] Harris v. American Int'l Fuel & Petroleum Co., 124 F. Supp. 878 (W.D. Pa. 1954).

[224] *Id.* at 879.

[225] ASPR app. A 10, Rule 14 (Rev. 3, 15 Nov. 1963). A like provision is contained in the rules for the USAREUR Board of Contract Appeals which sits in Heidelberg, Germany. See Headquarters, United States Army, Europe, Regulation No. 715–100, Annex B (28 Aug. 1965).

many excellent English language summaries of such rules contained in the many comparative law digests and texts available.[226]

V. CONCLUSION

This study has been primarily concerned with military procurement outside the United States in its simplest form. Although procurement of supplies and services for United States forces stationed in foreign countries will undoubtedly continue as long as these forces stay abroad, other new and challenging developments have grown from it. For example, it is not uncommon to find United States procurement personnel requested to assist in the development of procurement policies and procedures for international entities such as the North Atlantic Treaty Organization. As those military personnel are the clients of the government attorney rendering advice on matters concerning government contracts, he cannot be content with a knowledge of only the American system or philosophy of law. When the client moves into areas requiring the application of foreign laws, so must the attorney be ready to meet this challenge and be able to advise him correctly.

The examination made of the sources creating the rules governing military procurement outside the United States indicates the complexity of the problems which must be expected when dealing with this subject. The existence of the many international agreements between the United States and a foreign sovereign regarding offshore procurement requires that one who must use these tools to dispose of practical problems inherent in procurement law practice overseas, know the principles of public international law concerning the interpretation and application of treaties and other international agreements. In future situations it is hoped that the attorney involved in this practice can assist in lessening the confusion caused by having too many different agreements

[226] A summary of some of the rules of European countries is contained in SOMMERICH & BUSCH, FOREIGN LAW, A GUIDE TO PLEADING AND PROOF, ch. XIII (1959). An excellent series of bilateral studies in private international law covering the requirements of pleading and proof of foreign law before courts in other countries is published by Oceana Publications under the sponsorship of the Parker School of Foreign and Comparative Law, Columbia University, New York. As of this writing such studies are available regarding the law of Switzerland, France, Netherlands, Germany, Colombia, Greece, Denmark, Australia, Brazil, Chile, Austria, Japan, and Italy.

in one particular country. The lack of coordination which was so evident a factor in the development of procurement practices in France can only be prevented if matters regarding the procurement procedures to be applied are confined to one negotiating agency. This agency can coordinate the needs and desires of all other elements of the government to insure that one consistent procedure is established for use in that foreign country. Then it may be possible to prevent many of the conflicts and inconsistencies presently found when examining the various international agreements now applicable for use in a particular foreign state.

It has also been amply demonstrated that, as many of the principles of private international law are applied by courts and administrative tribunals in determining the respective rights of the parties to an offshore contract, the attorney must have at least sufficient knowledge to recognize an issue requiring the application of such principles and to know where they may be found.

The entire legal profession must recognize that from a broad viewpoint the arrangements made, the contracts entered into, and the experience gained have made a real contribution to the development of public and private international law in its practical everyday application. As was once said in the context of a similar subject and applicable in regard to the law surrounding government contracts outside the United States:

> We shall also have to look at the large number of bilateral concession agreements between a sovereign government and a foreign investor for the slow and halting development of international legal principles governing international investment. The first—and cardinal—principle—yet far from established—is that agreements between a government—or a government-controlled corporation—and a foreign private investor should come to be controleld by firm legal principles, modeled on the general principles of law—and, in particular, of contract—as recognized by civilized nations. This would be part of the increasing blending between public law and private law in the field of international economic transactions.[27]

Indeed, this is a challenging field of the law and one most demanding of the talents and knowledge of those involved in it. Thus, it is of utmost importance for the legal profession to be

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[27] Friedman, *Changing Social Arrangements in State-Trading States and Their Effect on International Law*, 24 LAW & CONTEMP. PROB. 350, 365 (1959).

aware of this field of the law in order that it may assist in seeing that it develops in a wise and just manner.

AGO 7289B

PROPRIETARY DATA AND TRADE SECRETS UNDER DEPARTMENT OF DEFENSE CONTRACTS *

By Major Robert M. Hinrichs**

This article is a study of the protection available to government contractors and subcontractors for their trade secrets and proprietary data. The author examines the common law, statutory, and administrative remedies, with particular emphasis on the provisions of the Armed Services Procurement Regulations concerning rights in technical data.

I. INTRODUCTION

During the process of researching, developing, and manufacturing its products, any company will generate large amounts of technical data. As the term "technical data" is applied to military procurement, it generally encompasses all types of specifications, standards, engineering drawings, instructions, manuals, tabular data, and test results used in the development, production, testing, use, maintenance, and disposal of military items, equipment, and systems.[1] Many forms of technical data are provided to customers as a matter of course, for example: data proclaiming the operating characteristics of new products, and data needed for the operation and maintenance of the product. In fact, most manufacturers want this sort of data to be disseminated, for its

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[1] Dep't of Defense Instruction No. 5010.13, para. III A (28 Dec. 1964).

advertising value and for increased customer satisfaction resulting from proper use and maintenance.

However, some of the data generated will fall into the class known as trade secrets and proprietary data. These were formerly defined in the Armed Services Procurement Regulations (ASPR) as

> data providing information concerning the details of a contractor's secrets of manufacture, such as may be contained in but not limited to its manufacturing methods or processes, treatment and chemical composition of materials, plant layout and tooling, to the extent that such information is not disclosed by inspection or analysis of the product itself and to the extent that the contractor has protected such information from unrestricted use by others.[2]

A manufacturing company's know-how, trade secrets, processes, and drawings are among its most valuable assets. The loss of these assets, by disclosure to competitors, can destroy a company's competitive position and may even lead to failure of the business. The fact that other manufacturers are eager to see the technical data of their competitors shows that the data involve competitive advantages. The fact that other manufacturers are willing to pay royalties for access to and use of technical data shows that the ownership of such data is a valuable property right.[3] Additional evidence of the value of proprietary data and trade secrets is the fact that there has been a long-standing feud between government and industry on the protection to be afforded such data. It has long been the practice of the government, as a part of government contracts, to require delivery of technical data on the products being purchased. This practice has caused friction between government and industry, since industrial companies do not relish the thought of losing their trade secrets. The main controversy involves the government's use of engineering drawings and other manufacturing data to procure the design manufacturer's products on the open market, thereby releasing the designer's trade secrets for use in competition against him.

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[2] Armed Services Procurement Reg. § 9-201(b) (1 July 1960) [hereafter cited as ASPR].

[3] A New York court recently awarded $5,000,000 to the American Cyanamid Company for damages resulting from the theft and transmittal to an Italian drug manufacturer of technical data, trade secrets, and cultures necessary to produce tetra-cycline antibiotics. Wall Street Journal, 18 Jan. 1966, p. 14, col. 5.

To protect his trade secrets, a government contractor must exercise care in deciding what data he will deliver, and he must insist on contract restrictions on the use of delivered data. If these measures fail, he must be prepared to use contract, tort, and other remedies to enforce his rights in the data. It is the purpose of this article to discuss the means of protection available to the government contractor for preservation of his proprietary interests.

II. PROTECTION FOR TRADE SECRETS UNDER TORT THEORIES

A. *BACKGROUND*

Our system of law protects the results of creative ability on the theory that this protection will stimulate creative work to the benefit of the whole nation. The patent system provides a reward only for full disclosure of inventions. If the inventor files a description of his invention in such full, clear, concise, and exact terms as to enable any person skilled in the art to construct, compound, make, and use the invention, then the inventor may secure the right to exclude others from making, using, or selling the invention for an unrenewable term of 17 years.[4] If, however, the inventor does not desire to limit himself to 17 years of exclusive rights, he may prefer to keep his discovery secret, in which case he will be free from competition for an indefinite period, as long as he maintains secrecy. The possibility of such long lasting protection for trade secrets, together with the continuing predilection of the United States Supreme Court towards finding patent invalid,[5] gives industry good reason to look more to the trade secret route for protection of their developments and inventions.[6]

The cases are in conflict on defining the requirements for trade secrets. The *Restatement of Torts* defines a trade secret as

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula

[4] 35 U.S.C. § 154 (1964).

[5] Mr. Justice Jackson, in his dissent in Jungerson v. Ostby, 335 U.S. 560, 572 (1948), stated that "the only patent that is valid is one which this Court has not been able to get its hands on."

[6] See Whale, *Government Rights to Technical Information Received Under Contract*, 25 GEO. WASH. L. REV. 289 (1957).

> for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.[7]

While it is clear that trade secrets need not be inventive or novel in the patent sense, some courts require that they at least be a discovery, not generally known in the trade or readily discernible by persons in the trade.[8] However, some courts require only that the information or knowledge represent in some considerable degree the independent efforts of the claimant.[9] The party claiming proprietary rights must actively take efforts to restrict access to the data. If freely transmitted without condition or restriction, the data enter the public domain and are no longer protectable.[10] If exposure of a device to the public makes its construction obvious, so that another can copy it without much expense in engineering, then there is no longer a trade secret after the first sale.[11] Thus, if a product available to the public *could* be copied very easily and without much expense, there is probably no trade secret at all, or, at best, the trade secret is lost on the first public sale. On the other hand, even if copying is difficult and costly, thus evidencing the existence of a trade secret, if anyone goes to the expense and effort of *actually* copying the product, using a publicly available sample as a model, then he has broken the trade secret legitimately.

The *Restatement* lists several factors for consideration in determining whether a person can rightly claim that a trade secret exists.

> (1) the extent to which the information is known outside of his business;
>
> (2) the extent to which it is known by employees and others involved in his business;
>
> (3) the extent of measures taken by him to guard the secrecy of the information;

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[7] RESTATEMENT, TORTS § 757, comment *b* (1939).

[8] Sarkes Tarzian, Inc. v. Audio Devices, Inc., 166 F. Supp. 250, 265 (S.D. Cal. 1958), *aff'd*, 283 F.2d 695 (9th Cir. 1960), *cert. denied*, 365 U.S. 869 (1961); *accord*, A. O. Smith Corp. v. Petroleum Iron Works Co., 73 F.2d 531 (6th Cir. 1934).

[9] Smith v. Dravo Corp., 203 F.2d 369, 373 (7th Cir. 1953).

[10] PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 294 (1964).

[11] Wissman v. Boucher, 150 Tex. 326, 240 S.W.2d 278 (1951); *accord*, RESTATEMENT, TORTS § 757, comment *b* (1939).

(4) the value of the information to him and to his competitors;
(5) the amount of effort or money expended by him in developing the information;
(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[12]

Trade secrets have long been protected at common law,[13] but the theoretical basis for relief varies from case to case. The subject is treated in the *Restatement of Torts* under the general heading of interferences with business relations. The decisions speak sometimes in terms of property rights and torts,[14] and sometimes in terms of breach of contract or breach of confidence.[15]

B. *RESTATEMENT AND CASE LAW FOLLOWING TORT THEORIES*

One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if
(a) he discovered the secret by improper means, or
(b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or
(c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or
(d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.[16]

These are general principles of the common law, declaring that the owner of an unpatented secret process has the right not to have his secret made public by theft, bribery, stealth, or by breach of a confidential relation, and that a person who obtains and discloses or uses a secret in such illegal manner commits a tort.[17] It is the employment of improper means to procure the trade secret, rather than the mere copying or use, which is the basis of the tort liability.[18] This marks one of the chief differences from the law of patents and copyrights, where the use and copy-

[12] RESTATEMENT, TORTS § 757, comment *b* (1939).
[13] See *id.*, comment *c*.
[14] Herold v. Herold China & Pottery Co.|, 257 Fed. 911 (6th Cir. 1919).
[15] Aktiebolaget Bofors v. United States, 139 Ct. Cl. 642, 153 F. Supp. 397 (1957).
[16] RESTATEMENT, TORTS § 757 (1939).
[17] See, *e.g.*, Aktiebolaget Bofors v. United States, 93 F. Supp. 131 (D.C.D.C. 1950), *aff'd*, 194 F.2d 145 (D.C. Cir. 1951), and cases cited therein.
[18] RESTATEMENT, TORTS § 757, comment *a* (1939).

ing themselves are prohibited, even if otherwise innocent. The owner of a valid patent has the right to exclude everyone else from making, using, or selling the device covered by his patent, even if another person independently discovers the same device. However, the owner of a secret process has no right, except against those who have obtained the secret from him by unfair means.[19] The protection of trade secrets is greater than of patents, as far as time (no limit) and novelty or inventiveness are concerned. But, the trade secret owner must bear the additional burdens of keeping the secret secure and of proving that the other got the secret by improper means. Of course, an inventor may maintain his invention as a trade secret pending the issuance of a patent.[20] His patent application is handled in confidence by the Patent Office, so there is no disclosure of the invention until the patent is actually issued.[21] Because of this secrecy, there can be no suit for infringement of a patent where the making, using, or selling was before the issuance of the patent.[22] Until the patent is issued, the inventor must rely upon his trade secret remedies.

Inspection and analysis of the product, independent invention of the same thing, and gift or purchase of the secret from the owner are proper means of acquisition.[23] Inspection and analysis of the product is often called reverse engineering, and anyone is free to copy a product using this method. But, the copier is not entitled to appropriate the originator's drawings for this purpose. He must actually undertake the labor and expense of reverse engineering.[24] The protection granted by the law of trade secrets is from one who pirates the developer's preparatory work, rather than from one who merely copies a finished product after doing his own preliminary work, such as preparing his own drawings or his own list of suppliers or customers. It is apparent that almost

[19] Smoley v. New Jersey Zinc Co., 24 F. Supp. 294 at 299 (D. N.J. 1938).

[20] Dolac Corp. v. Margon Corp., 164 F. Supp. 41, 56-60 (D.C. N.J. 1958); see also ELLIS, TRADE SECRETS § 141 (1953).

[21] 37 C.F.R. § 1.14 (1960) (Rules of Practice in Patent Cases).

[22] Anchor Hocking Glass Corp. v. White Cap Co., 47 F. Supp. 451 (D. Del. 1942).

[23] RESTATEMENT, TORTS § 757, comment *a* (1939).

[24] Schreyer v. Casco Products Corp., 97 F. Supp. 159, 168 (D. Conn. 1951), *aff'd in part, rev'd in part*, 190 F.2d 921 (2d Cir. 1951), *cert. denied*, 342 U.S. 913 (1951); see generally Penne, *Government Rights in Technical Data Under Prime Contracts and Subcontracts*, GOVERNMENT CONTRACTS AND PROCUREMENT—CURRENT TRENDS 119, 131 n.7 (1962).

any product could be copied by reverse engineering if the copier has the time, money, and engineering talent. As noted previously, the ease with which a product could be legitimately copied is one factor in determining whether a trade secret in fact exists. Since the government has almost unlimited time, money, and engineers, it has adopted a standard of what could "reasonably" or "readily" be discovered by analysis in its negotiations establishing proprietary rights.[25]

Physical force, larceny, trespass, fraudulent misrepresentations, wire tapping, eavesdropping, and spying are examples of improper means of acquiring a trade secret.[26] Generally, any conduct which is felt by the court to be below the standards of commercial morality will lead to tort liability.

Although Mr. Justice Holmes decried the use of the word "property" in connection with trade secrets,[27] it seems that property rights are the basis for the tort theory of protection. Trade secrets are more than mere ideas, since they have been reduced to practice and are generally embodied in some tangible form such as drawings or formulae. Since they are tangible and have value, it is not stretching a point to say the law protects them as property rights. Most courts recognize the inventor's rights as property, so long as he has protected his secret from release to the public.[28] And, the *Restatement* would provide protection in certain circumstances, even after the veil of secrecy has been pierced.

> One who learns another's trade secret from a third party without notice that it is secret and that the third party's disclosure is a breach of his duty to the other, or who learns the secret through a mistake without notice of the secrecy and the mistake,
>
> (a) is not liable to the other for a disclosure or use of the secret prior to receipt of such notice, and
>
> (b) is liable to the other for a disclosure or use of the secret after receipt of such notice, unless prior thereto he has in good faith paid value for the secret or has so changed his position that to subject him to liability would be inequitable.[29]

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[25] Penne, *supra* note 24, at 131.

[26] RESTATEMENT, TORTS § 757, comment *f* (1939).

[27] E. I. DuPont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917).

[28] Mycalex Corp. of America v. Pemco Corp., 159 F.2d 907 (4th Cir. 1947); Herold v. Herold China and Pottery Co., 257 Fed. 911 (6th Cir. 1919); Aktiebolaget Bofors v. United States, 93 F. Supp. 131 (D.C. D. C. 1950), *aff'd*, 194 F.2d 145 (D.C. Cir. 1951).

[29] RESTATEMENT, TORTS § 758 (1939).

This approach would seem to be based on a property right in the subject matter, since the person being held liable has committed no wrongful act in gaining knowledge of the secret, and he has entered into no contractual or confidential relationship with the owner of the secret. In the only case found presenting these facts, the Comptroller General failed to reach the issue of whether he would protect a trade secret under the rule set forth above.[30] Thus, it is still an open question as far as the government is concerned.

C. *FEDERAL TORT CLAIMS ACT*

It is provided in 28 U.S.C. § 1346(b) (1964) that the federal district courts shall have exclusive jurisdiction of civil actions on claims against the United States for money damages for injury or loss of property caused by the negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the U.S., if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. It would seem that this language is broad enough to allow a suit against the government, under the "loss of property" theory, for wrongful use or disclosure of a trade secret. However, 28 U.S.C. § 2680 (1964) contains 13 exceptions to the tort liability of the United States. Among these are clauses (a), acts or omissions done with due care in the execution of a statute or regulation, or discretionary acts or omissions, and (b), interferences with contract rights.

It has been held that a claim for allegedly illegal use of a trade secret does not sound in tort within the Federal Tort Claims Act jurisdiction.[31] In the *Bofors* case, the United States had a license to use the trade secret, but used it beyond the scope of the license and in competition with Bofors, the licensor. The holding of the case rests on the fact that the government had gained possession rightfully. Therefore, no tort was committed. The same result could be reached under other facts by resorting to the strict construction usually given to waivers of sovereign immunity.[32]

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[30] Ms. Comp. Gen. B–156727, 7 Oct. 1965.

[31] Aktiebolaget Bofors v. United States, 93 F. Supp. 131 (D.C. D.C. 1950), *aff'd*, 194 F.2d 145 (D.C. Cir. 1951); see also Whale, *supra* note 6, at 305.

[32] Baker v. United States, 127 F. Supp. 644 (D.C. D.C. 1955).

Since virtually all violations of trade secret rights would be perpetrated in a government procurement transaction, and since all such transactions are performed under the provisions of regulations such as the ASPR, it is probable such violations would fall within the exception of clause (a) above. If the government were not immune under the first part of that clause, it could probably classify the decision to disclose the secret as a discretionary act, thus fitting it into the second part of clause (a). In those cases where the basis of the claim is loss of value or damages due to interference with the owner's licensing arrangements with others, the exception contained in clause (h)[33] would protect the government from liability.

III. PROTECTION FOR TRADE SECRETS AND PROPRIETARY DATA UNDER BREACH OF CONTRACT AND BREACH OF CONFIDENCE THEORIES

A. *GENERAL PRINCIPLES*

Rightful possession of a trade secret is not alone sufficient to give unlimited rights to use or disclose it. If the possessor is on notice of its proprietary nature, or he has acquired it under restrictive conditions, then he has a duty not to disclose it, even though his possession is rightful.[34] Since an inventor must disclose his invention to associates and workmen in order to get assistance in commercial exploitation of the new device, the law protects this sort of confidential disclosure in order to promote commercial use which may benefit the public. This protection is really an application of the contract doctrine of specific performance. The employee or associate has made an express or implied contract that he will maintain secrecy, and the law will enforce the contract.[35] Often the result is achieved without mentioning

[33] 28 U.S.C. § 2680(h) (1964), which excludes from the Federal Tort Claims Act "any claim arising out of . . . interference with contract rights."

[34] American Dirigold Corp. v. Dirigold Metals Corp., 125 F.2d 446 (6th Cir. 1942); Aktiebolaget Bofors v. United States, 139 Ct. Cl. 642, 153 F. Supp. 397 (1957).

[35] Aktiebolaget Bofors v. United States, *supra* note 34; Ms. Comp. Gen. B–157300, 19 Nov. 1965.

"specific performance" but with reference to a general duty of good faith or confidence.[36]

The owner of a trade secret cannot impose a confidence on another without the other's consent.[37] If he discloses the secret to another despite the other's protest that it will not be held in confidence, then no confidential relation arises, and probably the secret is lost.[38] The same result follows if the recipient has no notice of the confidential nature of the disclosure.[39] However, no particular form of notice is required. It is sufficient if the recipient knew or should have known of the confidentiality, or if he was put on inquiry and reasonable inquiry would have revealed the facts of secrecy and confidentiality.[40]

A nondisclosure agreement may be implied in fact.[41] However, substantial evidence must be produced to establish such an implied agreement by the government.[42] An agreement to protect might be implied from the government acceptance of technical data with restrictive markings or with a request that the data be returned on completion of evaluation.[43]

A contract obligation to respect the owner's rights in a trade secret terminates upon public disclosure of the secret by the owner.[44] Such a termination of the duty by disclosure usually occurs when the owner is issued a patent on his invention, for then there is, by definition, no more "secret" to protect.[45] The only concern then would be infringement of the patent.

B. *GOVERNMENT DATA REQUIREMENTS*

The requirements for delivery of technical data are set out in contract delivery schedules, such as Department of Defense Form 1423, the "Contractor Data Requirements List." The purpose of

[36] E. I. DuPont de Nemours Powder Co. v. Masland, 244 U.S. 100 (1917); RESTATEMENT, TORTS § 757, comment *a* (1939).

[37] RESTATEMENT, TORTS § 757, comment *j* (1939).

[38] *Ibid.*

[39] *Ibid.*

[40] *Id.*, comment *l.*

[41] Schreyer v. Casco Products Corp., 97 F. Supp. 159, 167 (D. Conn. 1951), *aff'd in part, rev'd in part,* 190 F.2d 921 (2d Cir. 1951), *cert. denied,* 342 U.S. 913 (1951).

[42] Ms. Comp. Gen. B-157300, 19 Nov. 1965.

[43] *Ibid.*

[44] *Ibid.*

[45] Skoog v. McCray Refrigerator Co., 211 F.2d 254 (7th Cir. 1954); Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (2d Cir. 1949); Sandlin v. Johnson, 141 F.2d 660 (8th Cir. 1944).

such listing is to make known the specific intended uses for the data, the quantities required, and the precise identification of the required data.[46] Only when delivery is so scheduled do we get to the problems of rights in data. The contract clauses describing rights in data only define the rights in data which are elsewhere required to be delivered, and they make no delivery requirements of their own.

C. *REGULATORY HISTORY OF RIGHTS IN DATA*

The original 1949 version of the ASPR covered government acquisition of rights in patents and copyrights, but did not mention rights in technical data or trade secrets. In 1955, this area was first recognized by the addition of a required clause in all research and development (R&D) contracts.[47] The clause gave the United States complete rights to reproduce, use, and disclose, for governmental purposes, all data delivered under the contract. The Department of Defense (DOD) position was then, and probably still is, that the government gets unlimited rights under the common law in all data delivered, unless otherwise limited by express provisions of the contract.[48] Under the 1955 clause, there was no provision for protecting a contractor's proprietary information, and no consideration was given to whether the data originated before contract award (background data) or after award (foreground data). The grant to the government of rights to use and disclose for governmental purposes clearly included the right to use such data for competitive procurement.[49] Under such circumstances, if governmental purpose could be shown, former proprietary data ceased to be proprietary as far as government procurement was concerned.

Until 1957, it generally was not the government's practice to obtain engineering drawings from a developer for the purpose of competitive procurement. But, when Part 2 of ASPR, Section IX, was promulgated in the revision of 9 April 1957, it set out the new policy of procuring and using engineering drawings to allow

[46] Dep't of Defense Instruction No. 5010.11, para. VI B(3) (25 Feb. 1964).
[47] ASPR § 9-112 (4 Jan. 1955).
[48] Memorandum From the Assistant Secretary of Defense (Supply and Logistics) to the Assistant Secretary of the Army (Logistics and Research and Development), 13 July 1955.
[49] Ms. Comp. Gen. B-152684, 5 Feb. 1965.

greater procurement by formal advertisement. Industry had been unhappy with the prior situation, but they became even more upset at the increased likelihood that their own design work, including their trade secrets revealed therein, would be turned against them in competition.[50]

There were some means of protection built in, however. It was specifically provided that proprietary data should not be requested in advertised supply contracts for standard commercial items (absolute protection), and that such data would be obtained in negotiated supply contracts only when clear government need was established *and* the proprietary data were specified in the contract schedule after specific negotiation for such data as separate contract items.[51] But, even here, there was some danger. The military specifications on the preparation of drawings[52] required them to be so complete that they would necessarily reveal trade secrets used in the manufacture of an item. Thus, if drawings were required to be delivered, the contracting officer could require them to be complete, as specified, even if that meant including proprietary data. The conflict was not resolved for some 18 months, during which time many secrets were no doubt lost. However, a failsafe clause was added in 1958, providing that, in any supply contract not having as one of its principal purposes experimental or research work, proprietary data need not be furnished unless suitably identified in the delivery schedule of the contract "notwithstanding any Tables or Specifications included or incorporated in the contract."[53] This subclause did not automatically protect the contractor, but it put him in position to protect himself by allowing him to remove proprietary data from drawings, unless otherwise specifically required by delivery schedules. If the proprietary data were left on the drawing, the U.S. would have rights in them just as in any other data delivered.

How much data could be removed from a drawing under the guise of "proprietary rights" has been the subject of constant disagreement between the government and industry. Whether the expurgated or "Swiss cheese" drawings provide sufficient infor-

[50] Penne, *supra* note 24, at 120.
[51] ASPR § 9-202.1(b) (9 April 1957).
[52] *E.g.*, Military Specification MIL-D-70327, "Drawings, Engineering and Associated Lists" (superseded by MIL-D-1000).
[53] ASPR § 9-203.2(h) (15 Oct. 1958).

mation for their intended use, be it in-house or competitive reprocurement, depends on how much data has been removed and how much industrial know-how the user has to fill in the holes.

These prior provisions of ASPR, Section IX, theoretically gave good protection to proprietary data in supply contracts. But, in practice, the dividing line between supply and R&D contracts is often fuzzy. Because of budgetary practices, it is sometimes necessary to use R&D money for procurement of what are really supply items. To improve appearances, these contracts have included, at least on paper, some research or development objectives. But this has allowed the government to evade the protective measures prescribed for supply contracts and to include the unlimited-rights-in-data clause used in all R&D contracts. Under the prior regulations, if the company wanted the contract, it had to accept the risk of losing its proprietary data.[54] This use of economic leverage also has caused friction between government and industry.

While there was some degree of protection afforded under supply contracts, R&D contracts, under the prior provisions of ASPR, provided little or no protection for proprietary data. The contractor was required to furnish, for the price of the work, all data resulting directly from performance of the contract, whether or not they would otherwise be proprietary. This included all data necessary for reproduction and manufacture of the equipment or performance of the process developed under the contract. The only exceptions were for standard commercial items and for proprietary data relating to items developed at private expense, if they had been commercially sold or offered for sale prior to the contract in question.[55] The requirement that the item must have been not only developed at private expense, but also previously sold or offered for sale, was not a satisfactory limitation on the otherwise sweeping appropriation of proprietary data. The prior sale requirement was intended as proof of development at private expense prior to the contract in question. But, it allowed for the inclusion of proprietary data on all privately developed items of a military nature which could not be sold to anyone other than the government. This confiscation of data could only serve to dis-

[54] Ms. Comp. Gen. B–152684, 5 Feb. 1965.
[55] ASPR § 9 202.1(c) (15 Oct. 1958).

courage independent research and development by our defense industries.

Although there was an optional clause in the prior ASPR, Section IX, allowing for limitation of the rights to be acquired in proprietary data, this clause could not be used in R&D contracts.[56] Thus, all proprietary data was acquired with unlimited rights to use and disclose it.[57] In fact, one of the major points of discord has been the difficulty industry has encountered in getting the government to use the limited-rights-in-data clause under any circumstances.[58]

Throughout these earlier versions of ASPR, Section IX, Part 2, the Department of Defense used the trade secret concept as the basis for "protecting" what it called "proprietary data." However, DOD attempted to "clarify" the concept of trade secrets by narrowing the scope of coverage and protection. The definition of proprietary data in prior ASPR § 9–201(b)[59] did not allow full protection of trade secrets, since it excluded anything which *could* be reverse engineered. With enough money, almost anything can be reverse engineered, so the government was always in a position to deny the proprietary nature of data, and then, since the government would get the drawings, it could reproduce the item from the drawings without the added expense of reverse engineering. Industry has been highly critical of this reverse engineering limitation on the protection of its trade secrets.[60]

D. *CURRENT REGULATIONS ON RIGHTS IN DATA*

Because of the widespread complaints from industry about the confiscatory nature of the government's handling of proprietary data,[61] the Department of Defense undertook a complete revision of Part 2, Section IX, of the ASPR. The new data policy first appeared in Defense Procurement Circular Number 6, dated 14 May 1964. This circular provided for optional use of new rights in data clauses to provide a field test of the new policies. Since

[56] ASPR § 9-203.3 (15 Oct. 1958).
[57] ASPR § 9-202.2(b)(2) (15 Oct. 1958).
[58] Penne, *supra* note 24.
[59] See text accompanying note 2, *supra*.
[60] *Hearings on Proprietary Rights and Data Before Subcommittee No. 2 of the House Select Committee on Small Business*, 86th Cong., 2d Sess., at 30, 34, 52, 69, and 109 (1960).
[61] See, *e.g.*, Penne, *supra* note 24, at 152.

these new clauses have now been incorporated with only minor modifications in the new Part 2 of ASPR under Revision 10, dated 1 April 1965, it is assumed that they passed the field test.

The new paragraph 9–202.1 of ASPR expressly recognizes that commercial organizations have a valid economic interest in data they have developed at their own expense for competitive purposes, and that public disclosure of such technical data can cause serious economic hardship to the originating company. While also enumerating the interests of the government in acquiring technical data, the same paragraph counsels that control is necessary to insure government respect for its contractors' economic interest in technical data. In order to foster good relations and provide an incentive for the private development of items of military usefulness, the new policy is to acquire only such data and rights as are essential to meet government needs. Unlimited rights are to be demanded only in six circumstances; in all other circumstances, data, if required, will be delivered with only limited rights. It is hoped that, by this exercise of restraint and willingness to protect a developer's rights in data, the government will be able to encourage developers to deliver "non-Swiss-cheese" drawings, sufficiently complete to allow at least for all the required in-house uses, such as emergency repairs and overhaul.

In an effort to remove some of the confusion surrounding the definition of "proprietary data," the new Part 2 deletes that term altogether and uses only the term "data," which includes writings, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of a similar nature.[62] The term does not include financial reports, cost analyses, or other administrative information.

The effect of the new rights-in-data regulations is to acquire *some* rights in all the data otherwise required to be delivered under the contract schedule. But, a specific note is included in ASPR § 9–202.2(c), emphasizing the fact that requirements for *delivery* of data are to be dealt with separately in the contract delivery schedules. The question whether the government should take limited or unlimited rights in the data is now settled by determining whether the data, or the items to which they pertain, were developed at private expense or at the expense of the government.

[62] ASPR § 9–201(a) (Rev. No. 10, 1 April 1965).
[63] Penne, *supra* note 24.

The basic assumption is that the developer really has no standing to limit the government's rights in data which were developed at governmental expense. Conversely, the government should respect the contractor's interest in data developed at private expense by not demanding unlimited rights in such data.

The division into government-financed data and private-expense data should be acceptable to all, as long as it is possible to identify the dividing line. There is no definition of this line in the new Part 2 of ASPR, Section IX. However, under the 14 November 1960 redraft of ASPR § 9–201, "private expense" was taken to mean anything not developed at a government activity, nor under a government contract or government grant calling for such data.[63] There is no longer any requirement that items developed at private expense also meet the test of prior sale or offer for sale. This goes a long way toward meeting the industry objections to the former regulation.

A problem area under the present regulation may arise, however, in those instances where the data in question pertains to an item partially developed at private expense but completed at government expense. The DOD position on this issue was given by Mr. Graeme C. Bannerman, Assistant Secretary of the Navy (Installations and Logistics) and formerly Deputy Assistant Secretary of Defense (Procurement), in a DOD film explaining the new data policy: Where there is a mix of private and government funds, the developed item cannot be said to have been developed at private expense. The rights will not be allocated on an investment percentage basis. The government will get 100 per cent unlimited rights, except for individual components which were developed completely at private expense. Thus, if a firm has partially developed an item, it must decide whether it wants to sell all the rights to the government in return for government funds for completion, or whether it wants to complete the item at its own expense and protect its proprietary data. On the other hand, if the government finances merely an improvement to a privately developed item, the government would get unlimited rights in the improvement or modification but only limited rights in the basic item.

Under the new policy of ASPR § 9–202.2, when technical data are specified for delivery, they "shall be acquired with unlimited rights" whenever they fit into one of the following categories:

(1) technical data resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance in a Government contract or subcontract;

(2) technical data necessary to enable others to manufacture end-items, components and modifications, or to enable them to perform processes, when the end-items, components, modifications or processes have been, or are being, developed under Government contracts or subcontracts in which experimental, developmental or research work was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense;

(3) technical data constituting corrections or changes to Government furnished data;

(4) technical data pertaining to end-items, components or processes which was prepared for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements ("form, fit and function" data, *e.g.*, specification control drawings, catalog sheets, envelope drawings, etc.);

(5) manuals or instructional materials prepared for installation, operation, maintenance or training purposes; and

(6) other technical data which has been, or is normally furnished without restriction by a contractor or subcontractor."[64]

Paragraph 9–201 defines unlimited rights as "rights to use, duplicate, or disclose technical data in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so."[65] This, of course, means that a competitor to whom the data is disclosed by the government will not be limited in his use of the data, so he may use it commercially. Industry may regard this as a carry-over of a preexisting evil, but it is a necessary result. If the government were to attempt to determine which of its unlimited-rights data might cary a proprietary interest of the developers, not only would it be an intolerable administrative load, but also it would be a return to the old technical-legal battles of defining what is proprietary or what is a trade secret. The private expense-government expense dichotomy was devised to avoid such controversies. In addition to the administrative burdens of attempting to limit disclosures to governmental use, there is now a clearly expressed DOD policy that

when the Government pays for research and development work which produces new knowledge, products or processes, it has an obligation to foster technological progress through wide dessemination of the new and useful information derived from such work and where practicable to pro-

[64] ASPR § 9–202.2 (Rev. No. 10, 1 April 1965).
[65] ASPR § 9–201(c) (Rev. No. 10, 1 April 1965).

vide competitive opportunities for supplying the new products and utilizing the new processes.[66]

As was mentioned earlier, industry used to complain bitterly of the difficulty it had getting the governments to use a limited-rights clause for the protection of data. These complaints were apparently heard, because the limited-rights clause is now an integral part of the rights-in-data clause. And, the policy is now clear that, except as provided in the six categories set out above, all "technical data pertaining to items, components or processes developed at private expense will be acquired with limited rights if ordered."[67]

As noted in ASPR § 9–202.2(c), data pertaining to items, components, or processes developed at private expense may be called for, required, or otherwise furnished under categories (1), (3), (4), (5), and (6) above, and, as such, would be acquired with unlimited rights. However, it is probable that any such data in categories (1) and (3) would be mixed-expense data, discussed above; and any data in categories (4), (5), or (6), even if developed entirely at private expense, would not be of the sort usually claimed as a trade secret, since it would not normally convey any secrets of manufacture or other information offering a competitive advantage.

ASPR § 9–201 defines limited rights as follows:

> (b) *Limited Rights* means rights to use, duplicate, or disclose technical data in whole or in part by or for the Government, with the express limitation that such technical data may not be released outside the Government, or used, duplicated, or disclosed, in whole or in part, for manufacture or procurement, except for:
>
> (i) emergency repair or overhaul work by or for the Government where the item or process concerned is not otherwise reasonably available to enable timely performance of the work; and
>
> (ii) release to a foreign government, as the interests of the United States may require;
>
> *provided* that in either case the release of such technical data shall be made subject to the foregoing limitations of this paragraph (b).[68]

This appears to provide substantial protection for data developed at private expense, whether or not they are proprietary. Such data should not end up in the hands of a competitor, under either of the exceptions, unless they are subject to limitation to use or manufacture for the government. Since exception (i) would most

[66] ASPR § 9–202.1(c) (Rev. No. 10, 1 April 1965).
[67] ASPR § 9–202.2(c) (Rev. No. 10, 1 April 1965).
[68] ASPR § 9–201(b) (Rev. No. 10, 1 April 1965).

likely arise only in overseas areas, and exception (ii) refers only to foreign governments, it is doubtful that the data would ever be released to a domestic competitor of the developer. Moreover, ASPR § 9–202.3(e) requires that when "the Government proposes to make technical data subject to limited rights available for use by a foreign government, it will, to the maximum extent practicable, give reasonable notice thereof to the contractor or subcontractor who generated the technical data." This prior notice would allow the developer to take whatever steps he might think necessary to insure that his interests will be protected.

To avoid disputes after execution of a contract, the new data policy establishes a procedure for predetermination of rights by agreement in advance on what data will fall into the various categories.[69] Whenever there has been a predetermination of rights in data in a contract in which experimentation, development, or research work is specified as an element of performance, and the contractor wishes to use any item, component, modification, or process, the data for which are not covered by the predetermined listing but which would be furnished with only limited rights, then the contractor must advise the contracting officer promptly.[70] This should avoid later disputes on the protection to be afforded such data. It is made quite clear by the ASPR that none of these predetermination procedures are to be used by the contracting officer to try to pressure the contractor into providing data with unlimited rights, when they should be provided with limited rights under the private expense policy guidelines.

A separate procedure is provided by the ASPR for specific negotiation and acquisition of unlimited rights in any data, but the procedure is narrowly limited. It may be used only if the head of the procuring activity finds:

(i) there is a clear need for reprocurement of the item, component or process to which the technical data pertains;
(ii) there is no suitable item, component or process of alternate design or availability;
(iii) the item or component can be manufactured or the process performed through the use of such technical data by other competent manufacturers, without the need for additional technical data which

[69] ASPR § 9–202.2(d) (Rev. No. 10, 1 April 1965). Not only is this procedure provided for in the ASPR, but also its desirability is expounded on in Dep't of Defense Instruction No. 5010.12, incl. 4(2) (27 May 1964).
[70] ASPR § 9–202.2(d)(2) (Rev. No. 10, 1 April 1965).

> cannot be purchased reasonably or is not readily obtained by other economic means; and
>
> (iv) anticipated net savings in reprocurements will exceed the acquisition cost of the technical data and rights therein.[71]

The fact that such a procedure is provided, and that it is so strictly limited, should make it clear to all contracting officers that the DOD policy is to respect developers' rights in data by not trying to acquire unlimited rights unless absolutely necessary, and that, when such rights are necessary, developers are to be paid for the data supplied.

When a developer is delivering data with only limited rights pursuant to a contract, he must take the necessary steps to protect his interest in the data by marking them with a restrictive legend. A contractor cannot object to unlimited use of his proprietary data delivered under a contract with a limited-rights clause, where the contract required the data to be identified and the contractor failed to identify them.[72] The current rights-in-data clause under ASPR § 9–203 requires that all data delivered with limited rights be marked with a specific legend, which the government agrees to reproduce on any copies it makes of the data. Thus, the contractor will retain his common law rights in any trade secrets so marked, even if they should happen to reach the hands of a competitor. However, subclause (d) of the contract clause also provides for governmental removal of unauthorized markings, as follows:

> Notwithstanding any provisions of this contract concerning inspection and acceptance, the Government may modify, remove, obliterate, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if—
>
> (i) the Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the use of the marking, or
>
> (ii) the Contractor's response fails to substantiate his contention that the use of the marking is authorized, in which case the Government shall give written notice to the Contractor.[73]

This is a considerable improvement over the prior provisions of ASPR, which allowed the government to disregard unauthorized markings without notice to the contractor.[74] In addition to the government's right to ignore unauthorized markings, after notice,

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[71] ASPR § 9–202.2(g)(1) (Rev. No. 10, 1 April 1965).
[72] Ms. Comp. Gen. B–156152, 28 May 1965.
[73] ASPR § 9–203(b) (Rev. No. 10, 1 April 1965).
[74] Ms. Comp. Gen. B 156959, 6 Dec. 1965.

a contractor using some legend other than the one prescribed might well find that it is insufficient to restrict the use of the data, if they should fall into the hands of a competitor.[75]

Another area which has been considerably improved under the new data policy is that of subcontractor's data. Because of the economic value and possible competitive advantages inherent in most technical data, prime contractors are often anxious to secure unlimited rights in the data supplied to them by subcontractors under government contracts. This was made easier by the original data clauses in prime contracts. As was previously noted, there was not much concern given by the government to the prime contractor's rights in data, and limited rights clauses were seldom included, except in supply contracts. However, the prime contract data clause did have a flow-down provision, requiring that the same clause be included in all subcontracts. This meant that even the fixed-price supply type subcontract, providing for standard commercial parts, could require delivery of data with unlimited rights. This was really government encouragement of data piracy from the subcontractors, leaving them with even less protection than the prime contractors were getting. Although this inequity may still be perpetuated by new subcontracts under the old prime contracts, the new data poilcy provides better protection for the subcontractor.[76] It is now written into the prime contract that the prime contractor and higher tier subcontractors will not use their power to award subcontracts as economic leverage to acquire rights in data from their subcontractors for themselves. Since there is now a limited-rights clause included in all prime contracts, and there is also a flow-down requirement, the subcontractor will get at least the same protection for his data as the prime contractor. In addition, a new provision in the contract allows the subcontractor to deliver directly to the government any data which is required to be delivered with limited rights.[77] This will effectively prevent a prime contractor from gaining access to a subcontractor's trade secrets, even when they are required to be delivered under the contract.

One problem area which seems to be unchanged under the new data policy is the limitation-on-charges-for-data subclause of the

[75] See, *e.g.*, Ms. Comp. Gen. B–152684, 5 Feb. 1965.
[76] See ASPR § 9–203(b) (Rev. No. 10, 1 April 1965).
[77] ASPR § 9–203(b) (Rev. No. 10, 1 April 1965).

rights-in-technical-data clause.[78] The government has a legitimate interest in not paying charges for the use of data which the government already has a right to use and to disclose to others. Consequently, the government includes, in the rights-in-data clause of all contracts, a provision under which the contractor promises to make appropriate arrangements with any of its licensees for the exclusion or refund of royalties, to which it would otherwise be entitled, for the use of the contractor's data in any government contract with the licensee.[79] This provision applies not only to the data to be delivered under the contract being executed, but also to all other data owned or controlled by the contractor, in which the government, in any manner, may have obtained rights. It is one thing for the government to bargain and pay for royalty-free use of data delivered under the contract being negotiated; it is another thing to require the contractor, as a condition to getting that contract, to agree to give up his pre-existing rights to royalties under licensing agreements with other manufacturers, many of whom may be his competitors. This policy will probably not be changed, so long as there is great pressure from Congress and the Comptroller General to reduce government data costs. However, it will probably not save much money in the long run, since the contractor, in his negotiations on price, not only will consider the value of the data being delivered under the current contract, but also he will consider the possible loss of royalties on any other data as to which the government may have rights. But, the most serious drawback of the policy is its discouraging effect on licensing arrangements. Since the policy applies with equal force to charges being paid by foreign governments under the Military Assistance Program or other U.S. supported procurements, it will deter U.S. industry from entering into licensing agreements with foreign companies for the production of their military products.

E. *RESTRICTIONS ON DISCLOSURE OF DATA SUBMITTED WITH BIDS AND PROPOSALS*

When a bid is accompanied by descriptive literature and the bidder imposes a restriction on public disclosure of the informa-

[78] ASPR § 9-203(b) (Rev. No. 10, 1 April 1965).

[79] See subclause (f) of the rights-in-technical-data clause, ASPR § 9-203(b) (Rev. No. 10, 1 April 1965).

tion, the restriction may render the bid nonresponsive, if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered or those elements of the bid which relate to quantity, price and delivery terms.[80] However, if the literature is unsolicited and does not qualify the bid, it will not render the bid unresponsive.[81] Descriptive literature submitted with restrictions by a bidder shall not be disclosed in a manner which would contravene the restriction without permission of the bidder.[82] Since the descriptive literature might well include methods of manufacture and other trade secrets,[83] this is important protection which the government will give even at the risk of rendering the bid nonresponsive. If the bidder is careful in his selection of what literature is to be restricted, he can protect his trade secrets without rendering his bid nonresponsive. The requirement of 10 U.S.C. § 2305 (1964), that bids be opened publicly, is fully complied with by making available for public scrutiny the information normally required by the bid form, *i.e.*, prices, discounts, quantities, and delivery schedules. There is no requirement for publication of descriptive literature, even if required by the invitation for bid, when it is intended merely to show how the bidder proposes to manufacture and test the equipment.[84]

Requests for proposals may also require the offeror to submit data with his proposal which may include information the offeror does not want disclosed to the public or used by the government for any purpose other than evaluation of the proposal. In such cases the offeror may mark his data with a restrictive legend as follows:

> This data furnished in connection with Request for Proposals No._____, shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; *provided*, that if a contract is awarded to this offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use, or disclose the data

[80] ASPR § 2-404.4(a) (Rev. No. 4, 6 March 1964).
[81] ASPR § 2-404.4(a) (Rev. No. 4, 6 March 1964).
[82] ASPR § 2-404.4(b) (Rev. No. 4, 6 March 1964).
[83] ASPR § 2-202.5(a) (Rev. No. 4, 6 March 1964).
[84] 37 Comp. Gen. 640 (1958). But, it has also been held that there is no violation of trade secret or patent rights when the government gives to a successful bidder the production models submitted by other bidders. Ms. Comp. Gen. B-148376, 24 July 1962.

> to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction. The data subject to this restriction is contained in Sheets _____. (Dec. 1966).[86]

ASPR § 3–507.1 goes on to provide that data so marked shall be used only for evaluation of the proposals and shall not be disclosed outside the government without the written permission of the offeror except under the conditions provided in the legend.[86] In addition, the contracting officer is enjoined not to furnish any information during discussion with a prospective contractor which, alone or together with other information, may afford him an advantage over others.[87] And, finally, in the section on post-award notice of unaccepted offers, it is provided that "in no event will an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror."[88]

It would appear that the above provisions give the offeror a clear opportunity to obtain full protection for his confidential data, even if they do not meet the test of being a trade secret, if he will simply follow the regulations on submission of his proposal. However, in a recent opinion of the Comptroller General,[89] it is seen that failure to follow the regulation may cause loss of a trade secret. In this case, the offeror submitted a new idea for a star tracker, in response to a National Aeronautics and Space Administration (NASA) request for quotations, under a NASA Procurement Regulation almost identical to ASPR § 3–507. His proposal was not accepted, but, some time later, several of his ideas turned up in another NASA request for proposals. The original offeror protested to the Comptroller General that NASA was violating his proprietary rights in the star tracker design. Although the Comptroller General recognized the fact that the original offering was accepted with no indication that it would be used for purposes other than evaluation in connection with the original request for quotations, he nevertheless denied the protest. The grounds for the denial were that the design was submitted in response to a request under the provisions of NASA Procure-

[86] ASPR § 3–507.1(a) (Rev. No. 20, 1 Dec. 1966).
[87] See also FCC v. Cohn, 154 F. Supp. 899 (S.D. N.Y. 1957).
[88] ASPR § 3–507.2(b) (Rev. No. 20, 1 Dec. 1966).
[89] ASPR § 3–508.3(a) (v) (Rev. No. 16, 1 Apr. 1966).
[89] Ms. Comp. Gen. B–157300, 19 Nov. 1965.

ment Regulation § 3–109 (similar to ASPR § 3–507), and that that regulation required offerors to mark data which was delivered with restrictions. The existence of the regulation meant that the mere offer of technical information for evaluation, without markings, could not, by itself, necessarily imply that it is a trade secret or impose an obligation on the United States to so regard it and protect it. There must be an express or an implied in fact contract to protect trade secrets, and the regulation requiring restrictive markings manifests an intent to disaffirm an otherwise implied agreement to protect secrecy. The Comptroller General concluded by opining that the regulation was not only a codification of the common law requiring efforts to preserve secrecy, but that it also strikes the best balance, in the public interest, between proprietary rights and governmental needs, and it makes clear the government's intent in case of controversy.

The regulations outlined above concerning data submitted in response to invitations for bids and requests for proposals have only recently been revised to cover what has proved to be a problem area: the unsolicited proposal. The government encourages all citizens to come forward with any new ideas which may be of use to the nation, particularly in the area of national defense. Most laymen, and far too many otherwise astute businessmen and scientists, have no idea of either the need or the method for restrictively marking data to protect their proprietary rights. In fact, some people do not even realize that they had proprietary rights until they see someone else making money from their "stolen" idea. When an unmarked, unrestricted design or process is disclosed to a government agent, strictly speaking, the secret is out, and the government would be acting within its rights in procuring the item or process from someone other than the originator. However, if this became a widespread practice, the word would soon get out that the government was failing to protect inventions, and the result would be discouragement, rather than encouragement, of the voluntary proposal. The *Restatement of Torts* states that the protection of trade secrets is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices.[90] It bases the protection on breach of faith and reprehensible means of learning another's secret.

[90] RESTATEMENT, TORTS § 757, comment *b* (1939).

But, the Department of Defense tries to protect a little more than the law requires, precisely because it *is* trying to reward and encourage development of processes and devices, secretly or otherwise, as long as the developer will give the government a chance to apply the new idea to its needs. Government contracting officers will, under the provisions of ASPR § 4–205.1 (e) (4) (Rev. No. 20, 1 Dec. 1966), automatically protect all unmarked and unrestricted data which are submitted to them. It is suggested that responsible officers, when confronted with an obviously novel invention or process, should advise the offeror that he should take measures to protect it, thus instilling in him confidence in the integrity of his government, rather than the distrust which would result from the government's snapping up the idea and using it without compensation. In addition, all publications concerning the government's interest in inventions of military significance should carry a warning that proprietary rights will be respected only if the submission is clearly marked with a restrictive-use legend, and further advising that ideas should be submitted only to responsible, authorized contracting officers with authority to bind the government to an express agreement of nondisclosure and limited use for evaluation only. By placing unsolicited bids under the coverage of ASPR § 3–507, the government is protecting itself from becoming bound to respect rights in data which it also has procured, or can procure, from other sources. The penultimate sentence of the required legend, set out above, will cover such situations as the claimed trade secret which is already in the public domain.

IV. PROTECTION FOR TRADE SECRETS AND PROPRIETARY DATA UNDER EMINENT DOMAIN THEORIES

Under the provisions of 28 U.S.C. § 1498 (1964), the government's right to use a patented invention, even without prior license or agreement with the patentee, is recognized. This is an application of the laws of eminent domain. The patentee may not enjoin the United States from such infringement, because an injunction will not lie against the United States. And, the patentee may not enjoin a government contractor who has the government's authorization and consent to infringe the patent, since section 1498 provides that the exclusive remedy is suit for damages against

the United States in the Court of Claims. The same provisions apply to infringement of a copyright. A similar remedy for the infringement of trade secret rights was recently provided in section 606 of the Foreign Aid and Assistance Act of 1961.[91] This is a valuable remedy for the protection of trade secrets, based on the eminent domain theory, and it is recommended that a similar provision be enacted to provide this remedy for infringements occurring in all areas of government activity. However, it is to be noted that, again, suit or claim against the government is the exclusive remedy. The availability of a remedy directly against the infringing contractor would seem justified in the case of a trade secret, more so than a patent, because of the more serious consequences attending the loss of secrecy.[92]

It is entirely possible that a remedy for trade secret infringements, based on the eminent domain theory, is available even without specific statutes such as 22 U.S.C. § 2356. The Tucker Act provides that the Court of Claims shall have jurisdiction over any claim against the United States founded either upon the Constitution, an act of Congress, regulations of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[93] Leaving aside the contract theories, discussed above, it would seem that a good argument could be made that an unauthorized disclosure or use by the government of a trade secret is a taking of property within the meaning of the fifth amendment to the Constitution. This would then be a constitutional basis for a claim against the United States for just compensation.[94] This theory could be particularly valuable to counter a government argument, in defense of an implied contract suit, that damages were limited to the benefit actually received by the government.

V. CONCLUSIONS

It has been seen that the government has certain interests which dictate that it secure technical data in connection with its pro-

[91] 75 Stat. 440 (1961), 22 U.S.C. § 2356 (1964).
[92] See 42 Comp. Gen. 346 (1963).
[93] 28 U.S.C. § 1491 (1964).
[94] See Spevack v. Strauss, 257 F.2d 208 (D.C. Cir. 1958), *modified per curiam*, 359 U.S. 115 (1959).

curements of supplies and equipment. The government must insure that it gets sufficient data, and rights therein, to enable it to perform the essential missions of operation, maintenance, overhaul, and possibly resupply, without paying twice for the same data and with the smallest possible initial payment. At the same time, the government has an interest in encouraging industry to come forward with developments and improvements in military equipment, and this can be accomplished best by not demanding unlimited rights in data, except where there is a real need; by paying for unlimited rights when they are needed; and by protecting data as to which it gets limited rights. The government interest which causes the most conflict with the design manufacturers is the policy to foster development of a strong, decentralized, industrial base, and to procure items at the lowest cost by competitive, formal advertising based on manufacturing drawings supplied by the developer. Because of the constant pressure for economy in defense procurement, from both within and without the Department of Defense, such formal advertisement is the preferred method of procurement.

Against all these governmental interests, it has been seen that the developer usually is anxious to supply only the data necessary for proper operation and maintenance of his products. He wants to retain all data which might be of commercial value to his competitors, and particularly he wants to protect his trade secrets. The new data policy promulgated in Revision 10 of ASPR, Section IX, Part 2, recognizes these interests of the contractor and of the government and attempts to strike a workable balance between the two. The developing contractor is given the opportunity to protect his proprietary data by bargaining with the government as to what data will be delivered under a contract. And, the rights in such data are definitely established prior to execution of the contract, either by reference to the prescribed categories of data, or by predetermination, or by specific acquisition.

If all these preliminary protective measures fail and the proprietary rights of a government contractor are violated by an unauthorized disclosure or use of his data, then, as noted previously, he has a whole battery of remedies available to him. Probably the first remedy which he should pursue—if it appears that proprietary data is being disclosed to unauthorized persons, as in an invitation for bids on a competitive reprocurement—is a pro-

test to the Comptroller General. This is the closest thing to an injunction which is available against the Government, since the Comptroller General can, and does, order cancellation of an invitation for bids or a request for proposals, and he can order recovery of the drawings or other data.[95] This remedy would seem to be based upon the principle that the government should be held to a high standard in the performance of its obligations under confidential and contractual relationships.[96] In a rare case, the Comptroller General has acted to cancel, on the basis of an unauthorized disclosure of proprietary data, a contract already awarded, even though the data may not have met the test for trade secrets.[97] But, ordinarily, where a contract has already been awarded to a competitor, the Comptroller General will deny the protest and refer the petitioner to the courts.[98]

In court, the common law remedies for trade secret infringements are injunction, damages for past harm, accounting for profits, and return of the drawings or other protected matter.[99] Though the injunction remedy is not available against the government, the damages remedy would be available under the Tucker Act[100] by suit in the Court of Claims. The concurrent jurisdiction of the district courts could be invoked under the provisions of 28 U.S.C. § 1346(a)(2) (1964), but the $10,000 limitation on that jurisdiction is small enough to make this approach unlikely in most trade secret cases. If a patent is granted on the invention disclosed by the government's action, then an infringement suit may be brought under 28 U.S.C. § 1498 (1964). The prohibition of suits against government contractors for patent and copyright infringement[101] does not, in its terms, apply to trade secret violations. Therefore, the owner of a trade secret can fall back on the full range of common law remedies in a suit against the contractor to whom his secret was disclosed. Such a suit would

[95] 43 Comp. Gen. 193 (1963).
[96] See Ms. Comp. Gen. B–154079, 14 Oct. 1964; 43 Comp. Gen. 193 (1963); 42 Comp. Gen. 346 (1963); 41 Comp. Gen. 148 (1961).
[97] Ms. Comp. Gen. B–143711, 22 Dec. 1960, 15 May 1961, 21 June 1961; see also RESTATEMENT, TORTS § 757, comment *b* (1939).
[98] Ms. Comp. Gen. B–152410, 9 June 1964; Ms. Comp. Gen. B–149403, 28 Sept. 1962.
[99] RESTATEMENT, TORTS § 757, comment *e* (1939).
[100] 28 U.S.C. § 1491 (1964).
[101] 28 U.S.C. § 1498 (1964).

have to be based on the theory found in the *Restatement of Torts* § 758, discussed above, and would depend on proof of use of the secret by the contractor after notice of the owner's proprietary interest and the government's unauthorized disclosure.

Although the remedies listed above provide for the protection of most proprietary rights involved in government procurement situations, it is recommended that direct suit against the government be specifically authorized for trade secret violations in any government activity, as is now provided under the Foreign Aid and Assistance Act.[102] With such a remedy added to those already available, the owner of a trade secret would have adequate protection in all cases where he has taken the necessary precautions to first try to protect himself. By taking such precautions, he might even be able to match the enviable record of the Coca-Cola Company, which has successfully maintained the formula for its product as a trade secret since 1886.[103]

[102] 75 Stat. 440 (1961), 22 U.S.C. § 2356 (1964).

[103] See *Forward* to COCA-COLA, OPINIONS, ORDERS, INJUNCTIONS, AND DECREES RELATING TO UNFAIR COMPETITION AND INFRINGEMENT OF TRADE-MARK (1923) (a three volume compilation).

THE FEDERAL GOVERNMENT AS AN INSURED UNDER AN EMPLOYEE'S AUTO INSURANCE POLICY *

By Major Thomas E. Murdock**

Is the U.S. government, in an action against it under the Federal Tort Claims Act, an insured under the "omnibus clause" coverage of its employee's auto liability insurance policy? This article discusses that question as it was answered by the courts prior to 1961 and as it has been affected by the 1961 exclusive remedy amendments to the Federal Tort Claims Act and the certification of scope of employment by The Attorney General. The author concludes that further legislation is needed and sets forth a proposed amendment to the exclusiveness of remedy provisions.

I. INTRODUCTION

The purpose of the study undertaken here is to examine the legal relationships created by the tortious conduct of a federal employee while driving a motor vehicle in the regular course of his employment. This article will focus on the relationship between the United States government and the insurer of the government employee, a relationship created by virtue of the usual

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"omnibus clause"[1] contained in most automobile insurance policies.

The cases under consideration here will fall necessarily into two periods: 1946–1961, and 1961–present. The year 1946 marks the passage of the Federal Tort Claims Act[2] and the earliest point in time when the general aspect of vicarious liability for the torts of its servants was of concern to the U.S. government.[3] The year 1961 is the pivotal point of this study, as that was the year Congress passed the so-called exclusive remedy amendments[4] to the FTCA.

To avoid the reiteration of similar factual situations, it is pointed out here that the cases under discussion, unless otherwise noted, share these common characteristics:

(1) The government employee owns the automobile involved in the accident;
(2) He has personally paid the premiums for the liability insurance on the automobile;
(3) The accident occurred during the course of the employee's government duties; and
(4) The insurance policy in question contains the omnibus clause of the same legal implication as that quoted in footnote 1.

II. THE PERIOD PRIOR TO 1961

A. *THE GOVERNMENT AS AN INSURED*

In 1956, in the case of *Rowley v. United States*,[5] a federal district court had before it for the first time the question whether the United States is an insured under the terms of the omnibus clause of its servant's policy. In this case, suit was brought

[1] Such a clause usually provides that within the meaning of the term "insured" is included "the named insured and also any other person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission or counsel." See 12 COUCH, INSURANCE § 45:291 (2d ed. 1964).

[2] 28 U.S.C. § 1346(b) (1964) [hereafter called the FTCA].

[3] Prior to the FTCA, courts generally held that government was immune to liability for the acts of its employees. See, *e.g.*, Narloch v. Church, 234 Wis. 155, 290 N.W. 595 (1940).

[4] 28 U.S.C. § 2679(b)–(e) (1964).

[5] 140 F. Supp. 295 (D. Utah 1956).

against the United States under the FTCA, and the United States attorney moved to interplead the insurance carrier of the negligent government employee as a third party defendant. On the day set to argue the merits of the government's motion, counsel for the government and counsel for the insurance company informed the court that, subject to its approval, the parties had agreed that judgment should be entered for the plaintiff. Part of this judgment was to be satisfied by the insurance company and part by the government. The court rejected this "sharing" proposal on the theory that either the United States government was an insured under the policy or it was not. In either event, the court felt the sharing agreement was inappropriate. The court then allowed the insurance company to be interpleaded as a party defendant. No case law is cited to support the holding of the court that, subject to its approval, the parties had agreed that States government is an insured under the omnibus clause of its employee's insurance policy.

With a similar procedural background, *Irvin v. United States*[6] was the next test of the basic question, and the same result was reached. The court in *Irvin* was high in its praise of the employee who sees his duty to carry insurance, saying that "courts should be reluctant to discourage such commendable action."[7] The court also to some extent founded its decision on the fairly settled proposition[8] that contracts of insurance will be construed strictly against the insurance company. There is authority, however, that casts doubt on this principle as applied to one lacking privity of contract,[9] such as an additional insured under the omnibus clause. It should be mentioned that in both *Rowley* and *Irvin* the courts discussed, and to some extent seemed to rely upon, the fact that the insured employee in each case, prior to the issuance of the policy involved, declared his use of the insured automobile to be for business as well as pleasure, and that the premium charged probably took this into account.

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[6] 148 F. Supp. 25 (D.S.D. 1957).

[7] *Id.* at 33.

[8] See Kautz v. Zurich Gen. Acc. & Liab. Ins. Co., 212 Cal. 576, 300 P. 34 (1931).

[9] See American Lumbermen's Mut. Cas. Co. v. Trask, 238 App. Div. 668, 266 N.Y.S. 1 (1933), *aff'd* 264 N.Y. 545, 191 N.E. 557 (1934).

B. *THE EMPLOYEE'S SITUATION PRIOR TO THE 1961 AMENDMENTS TO THE FTCA*

With the passage of the FTCA, the government allowed itself to be sued in tort for the negligent acts of its servants occurring during the course of their employment. The statute was permissive, however, and in many cases provided no real protection to the government employee. Under the FTCA, the plaintiff could choose to sue the United States, but only on the terms granted by the United States. This calls for suit in a federal district court[10] with no jury,[11] and, in the event a decision to settle or compromise is reached, the court's approval must be obtained.[12]

Of course, the pre-1961 plaintiff could always choose to ignore the FTCA remedy and sue the employee in an appropriate state court, where judgments awarded on jury verdicts are reputedly higher than those given by judges. Suits such as this resulted in undue financial burdens on government drivers and lead to private bills being presented to Congress to indemnify these drivers,[13] causing an administrative burden upon the executive and legislative branches.

C. *GOVERNMENT'S RIGHT OF INDEMNIFICATION AGAINST EMPLOYEE*

The question whether the U.S. government has the right of indemnification against its employee after it has satisfied a judgment against him under the FTCA is another facet bearing on an understanding of the overall problem. It has relevance when considering whether the U.S. government should be indemnified through the insurance policy of its employee.

In *United States v. Gilman*,[14] the United States Supreme Court had to decide, as a matter of first impression, the right of the U.S. government to indemnity from its employee. The suit in question was brought against the United States as defendant under the FTCA. The United States filed a third party complaint against its employee, Gilman, asking indemnity from him should the United States be held liable to the original plaintiff. The

[10] 28 U,S,C, § 1346(b) (1964).
[11] 28 U.S.C. § 2402 (1964).
[12] 28 U.S.C. § 2677 (1964).
[13] See 2 U. S. CODE CONG. & AD. NEWS 2784, 2791 (1961).
[14] 347 U. S. 507 (1954).

trial court awarded $5,500 damages to the plaintiff against the United States, and then over against Gilman on the third party complaint. On Gilman's appeal, the circuit court reversed on a divided vote and the Supreme Court granted certiorari. The United States' position on the matter was that it, as any employer who has satisfied a judgment on account of one of its employee's torts, has the right to indemnity.[15] The Supreme Court, however, found in favor of Gilman, basing its decision at least in part upon the premise that the FTCA was engendered in an effort to improve employee morale and Congress could have written indemnification into the law had it wanted to do so, and also that indemnification in such a situation would amount to a form of discipline.[16]

In *Grant v. United States*,[17] the United States Court of Appeals for the Second Circuit decided a case involving an innovation on the holding in *Gilman*. Suit was brought against the United States under the FTCA by a newspaper carrier who had injured his knee on an unlighted stairway at the United States Merchant Marine Academy. Since the injury occurred at a building occupied by the Ship's Store, the Ship's Service Officer, as the head of that activity, and his liability insurer, Royal Globe Insurance Company, were interpleaded as third party defendants by the United States. The court of appeals deciding the case concluded that, while the rule announced by the Supreme Court in *Gilman* precluded the U.S. government's indemnification from the Ship's Service Officer, this rule did not preclude recovery by the United States from the employee's insurer, Royal Globe.[18]

Then *Uptagrafft v. United States*,[19] a case in which the accident involved occurred prior to the 1961 amendments to the FTCA and hence not subject to those provisions, but which was decided in 1963, provided another twist to the indemnification picture.

[15] The proposition argued for is the prevailing one, generally, with regard to the relationship between one primarily liable because of his wrongdoing and another liable because of the doctrine of *respondeat superior*. See Porter v. Norton-Stuart Pontiac-Cadillac of Enid, 405 P.2d 109 (Okla. 1965).

[16] United States v. Gilman, 347 U. S. 507, 509–10 (1954).

[17] 271 F.2d 651 (2d Cir. 1959).

[18] The rationale of the case did not turn in any way upon the construction of an omnibus clause, but rather upon the court's finding that the parties to the insurance contract had intended that the United States would be protected under the policy as an insured.

[19] 315 F.2d 200 (4th Cir. 1963).

Under the uncontested facts, Uptagrafft, a government employee acting within the scope of his employment, was driving a government vehicle at the time of the tortious conduct involved. The plaintiff elected to sue Uptagrafft in the state court, rather than in the federal court under the FTCA. The United States was asked to defend the action in the state court but declined to do so, and eventually the defense of the action was undertaken by Uptagrafft's liability insurance carrier under the "drive other car"[20] clause of its policy. Before trial, a settlement was negotiated between the plaintiff and the insurer, and then the case was removed to the federal court,[21] where Uptagrafft obtained an order impleading the United States as a third party defendant. Uptagrafft's insurer was allowed to intervene after it had paid the negotiated settlement disposing of the plaintiff's claim. After these diverse mechanics were resolved, the sole issue left before the court was the question whether Uptagrafft and his insurer were entitled to indemnification from the United States under the situation presented above. In its holding, the court cites *United States v. Gilman* and notes that in that case "the Supreme Court refused to create a rule of indemnity in favor of the United States. Conversely, in this case, we decline to create a rule of indemnity against the United States."[22]

Two other points made by the court in *Uptagrafft*, but not essential to the court's holding, are of more interest than the results, as they involve consideration of the 1961 amendments to the FTCA. The first is the following footnote dicta:

> Since the automobile wreck occurred on September 11, 1959, we note, as did the district judge, that the amendments of September 21, 1961 to Title 28 U.S.C.A. § 2679 have no application to this case. By their own terms, the Amendments become effective six months after the date of enactment but "any rights or liabilities than [sic] existing shall not be affected." These amendments, in effect, substitute the liability of the United States exclusively for that of its employees operating motor vehicles within the scope of their employment. On the state of the facts which are assumed for purposes of this appeal, if these amendments had been enacted and effective prior to September 11, 1959, Edwards could

[20] Such a clause protects the named insured while operating an automobile not owned by him.

[21] The report of the case is silent as to the basis for the removal. However, this point is not deemed significant for the purpose under discussion here.

[22] Uptagrafft v. United States, 315 F.2d 200, 203–04 (4th Cir. 1963).

not have sued Uptagrafft, but, instead, his only remedy would have been a suit against the United States.[23]

The other point is an assertion by the court that "by its own terms, the amendments became effective at the time specified by Congress—to [sic] late to benefit Uptagrafft and State Farm."[24] It is significant to note that the court's assumption of benefit to the insurer has not been borne out by the cases occurring after *Uptagrafft* in which the exclusive remedy amendments were applicable.

III. THE EXCLUSIVE REMEDY AMENDMENTS TO FTCA

The legislative history of the exclusive remedy amendments to the FTCA reveals that several proposals to assist government employees in scope of employment automobile accidents were considered prior to the adoption of the present amendments.[25] One such proposal was an indemnification system whereby the government would satisfy any judgment obtained against the employee, pay counsel fees and other costs of defending such an action, and also administratively settle and pay claims not reduced to judgment. An alternative proposal considered prior to the submission of the legislation ultimately adopted involved the procurement by the government, at its expense, of insurance covering officers and employees of the government while operating automobiles in the scope of their employment. A study of the history of the amendments reveals that various government agencies queried about the matter felt that both of the rejected alternative proposals would be more costly than the adopted legislation. Another criticism of the indemnification proposal was that it was felt to be at variance with the provisions of 28 U.S.C. § 2402, which requires that actions brought under the FTCA be tried in a federal court without a jury. The amendments eventually adopted are as follows:

> (b) The remedy by suit against the United States as provided by Section 1346(b) of this title for damage to property, or for personal injury, including death, resulting from the operation of any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the

[23] *Id.* at 202, n. 1.
[24] *Id.* at 204.
[25] See 2 U. S. CODE CONG. & AD. NEWS 2784 (1961).

employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a state court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing or a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in Section 2677, and with the same effect.[26]

A. *INITIAL CONSTRUCTION OF THE AMENDMENTS*

The first case considering the effect of the exclusive remedy amendments was that of *Gipson v. Shelley*.[27] After suit was brought by the plaintiff in a state court against the government employee, the Attorney General issued his certification that the employee, Shelley, was acting within the scope of his employment, and the case was removed to the federal district court. The report of the case decided only the interlocutory question raised by a motion made by the government to join Government Employees

[26] 28 U.S.C. § 2679 (1964). Provisions existing prior to the 1961 amendments were designated as subsection (a), which reads:

"(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under Section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive."

[27] 219 F. Supp. 915 (E.D. Tenn. 1963).

Insurance Company (GEICO), the insurance carrier of Shelley, as a third party defendant. Noting in its opinion that this was a case of first impression since the 1961 amendments to the FTCA, the court denied the motion to join GEICO. The reasoning of the court was that the insulation of Shelley by virtue of 28 U.S.C. § 2679 also served to insulate his insurer, GEICO, who contracted with Shelley to be liable for damages which he might become legally obligated to pay, and that if anyone is liable to the plaintiff it is the United States.[28]

In *Perez v. United States*,[29] another federal district court had the opportunity to interpret the new amendments to the FTCA. The case is factually distinguishable from most of the cases considered herein for two reasons. The first is that the government employee involved, one Thomas Jones, was operating a truck owned by the U.S. government. And, second, the question of insurance is not raised at all. Suit in this case was brought originally in the federal court against the United States and Jones, with jurisdiction under 28 U.S.C. § 1346(b). It was alleged by the plaintiff, and conceded by the government, that Jones was acting within the scope of his employment at the time of the accident. The only matter decided by the court was an interlocutory motion by the defendant, United States, to dismiss the action as to its employee, Jones. In its motion, the government relied upon the exclusive remedy amendments to the FTCA and argued that the Congress intended thereby "to bar suits against Government driver employees in their individual capacity when involved in an accident while in the scope of their employment."[30] In opposition was the plaintiff's argument[31] that the intent of the statute was merely to preclude one suit in federal court against the United States and another suit in state court against the government employee, where both actions arose out of the same

[28] The report of the case is silent as to the language of the insurance policy issued by GEICO to Shelley, and the type of omnibus clause, if any, is not known.

[29] 218 F. Supp. 571 (S.D.N.Y. 1963).

[30] *Id.* at 572.

[31] Although not necessarily germane to the study undertaken here, one cannot help but wonder, as did the author of the cited opinion, what advantage to the plaintiff there could be in retaining Jones, the government driver, as a defendant in this case.

accident. The court concluded that the position taken by the government in its motion was correct and ordered that Jones be dismissed as a party. The decision gave effect to what the court apparently deemed to be the intent of Congress, namely, that in recognition of its duty to its employees, an action brought under 28 U.S.C. § 1346(b) by virtue of the 1961 amendments to the FTCA would be solely and exclusively a suit against the federal government.

B. *ANOTHER LOOK AT THE AMENDMENTS*

From the effective date of the 1961 amendments until January of 1964, *Gipson v. Shelley*[32] was the only reported case in which the court was required to consider whether an insurance carrier of a federal employee was to be protected by the amendments, or whether the earlier rationale of *Irvin*[33] and *Rowley*[34] survived in the exclusive remedy atmosphere. Had the insurance underwriters and decision makers of that industry been following the situation, they no doubt would have felt secure in what had transpired. The government had apparently tried to use the shield of its servant's insurance only on one occasion, and it had lost. But, this had been predicted in an earlier case, by dicta, wherein the accident had occurred prior to the amendments.[35] And perhaps even a stronger capsule for an insurer's serenity would have been the logical intuition that, because the United States had decided that it would be the only defendant in such an accident in scope of employment, there could not possibly be cause for concern.

Perhaps the most complete opinion regarding the problem is that written in the case of *McCrary v. United States*[36] by the author of the decision in *Gipson v. Shelley*.[37] The facts of the case are atypical in several characteristics from the ordinary fact situation. Mr. McCrary brought his suit originally in a federal district court, alleging jurisdictional amount and diversity as a basis for federal jurisdiction. A Mr. Kuhn was the original defendant, and he was operating his own automobile at the time of

[32] 219 F. Supp. 915 (E.D. Tenn. 1963).
[33] 148 F. Supp. 25 (D.S.D. 1957).
[34] 140 F. Supp. 295 (D. Utah 1956).
[35] Uptagrafft v. United States, 315 F.2d 200 (4th Cir. 1963).
[36] 235 F. Supp. 33 (E.D. Tenn. 1964).
[37] 219 F. Supp. 915 (E.D. Tenn. 1963).

the accident. The United States attorney then issued a certificate averring that Mr. Kuhn had, at the time of the accident, been acting within the scope of his employment,[38] and that plaintiff's remedy was one against the United States under Section 1346(b), and that "such remedy is exclusive."[39] Another distinguishing characteristic lies in the fact that there does not appear to have been any declaration on the part of Mr. Kuhn to his insurer, at the time of taking out the policy, that he would use his automobile in the service of the United States or for business in general. Then, to complete the familiar procedural triangle, Mr. Kuhn's automobile liability insurer was impleaded by the United States as a third party defendant. As the insurance policy in question contained the usual omnibus clause, the court had before it the question of the ability of the federal government to underwrite its largess to its employees at the expense of State Farm Mutual Insurance Company.[40]

In an opinion that would appear to concede every possible point the insurance attorneys could have made for their position, and perhaps then some, the court looked at the problem quite extensively and held that the United States was indeed an insured under the omnibus clause of Mr. Kuhn's policy with State Farm Mutual. It is clear, from everything said in the opinion, that its author held that the United States was an insured contrary to his personal view of the law, reaching this result because of several similar holdings within the same circuit. For this reason, the opinion is styled by its author as a "dissent" from its own holding.[41]

In the recent case of *Myers v. United States*,[42] which is somewhat unusual in its reasoning, a Texas federal district court refused to find the United States an additional insured under an

[38] The issuance of a certification of scope by the U. S. Attorney in this case appears unusual in that such certification is provided for in the statute (28 U.S.C. § 2679(d) (1964)) only when an action is brought originally against the government employee in a state court. This phenomenon occurred again in the case of Vaughn v. United States, 225 F. Supp. 890 (W.D. Tenn. 1964). No significance is attached to this fact in either case report.

[39] McCrary v. United States, 235 F. Supp. 33, 34 (E.D. Tenn. 1964).

[40] Mr. Kuhn's automobile liability insurer.

[41] McCrary v. United States, 235 F. Supp. 33, 38 (E.D. Tenn. 1964).

[42] 241 F. Supp. 515 (N.D. Tex. 1965).

omnibus clause which was alike in all material respects with those previously discussed. The primary basis for its holding was the fact that the employee, in his declaration to his insurer at the time of taking out the policy, did not indicate a business use for his automobile. The court found that a 40 per cent higher premium would have been charged had such a declaration been made.

The "size of the premium" rationale decides the issue of coverage extension to the United States under the omnibus clause without regard to the legal import of the language of the clause. This rationale, used to exclude the United States as an additional insured, is no more persuasive than the converse of the same rationale was in *Irvin*[43] and *Rowley*,[44] which cases held the United States to be an additional insured. From early 1964 until the present, with the exception of *Myers v. United States*,[45] the federal district courts have, in a significant number of cases,[46] had no apparent difficulty in finding that the United States is an additional insured under the omnibus clause coverage of its employees' policies in fact situations not materially distinguishable from that set out in the introduction to this study.

C. *THE NO ACTION CLAUSE AS A DEFENSE*

On occasion the insurer, in an effort to escape a construction of its omnibus clause including the United States as an insured, has attempted to utilize the "no action" clause of its policy to advantage. Such a clause was contained in the policy involved in the early *Irvin* case[47] as follows:

> No action shall lie against the Association unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have finally been determined either by judgment against the insured

[43] 148 F. Supp. 25 (D.S.D. 1957).

[44] 140 F. Supp. 295 (D. Utah 1956); *accord*, Vaughn v. United States, 225 F. Supp. 890 (W.D. Tenn. 1964).

[45] 241 F. Supp. 515 (N.D. Tex. 1965).

[46] Government Employees Ins. Co. v. United States, 349 F.2d 83 (10th Cir. 1965); United States v. State Farm Ins. Co., 245 F. Supp. 58 (D. Ore. 1965); Adams v. United States, 241 F. Supp. 383 (S.D. Ill. 1965); Gahagan v. State Farm Ins. Co., 233 F. Supp. 171 (W.D. La. 1964); Barker v. United States, 233 F. Supp. 455 (N.D. Ga. 1964); Patterson v. United States, 233 F. Supp. 447 (E.D. Tenn. 1964); Vaughn v. United States, 225 F. Supp. 890 (W.D. Tenn. 1964); Nistendirk v. United States, 225 F. Supp. 884 (W.D. Mo. 1964).

[47] 148 F. Supp. 25 (D.S.D. 1957).

> after actual trial or by written agreement of the insured, the claimant, and the association.[48]

The court in *Vaughn v. United States*,[49] a case arising after the 1961 amendments to the FTCA, had little difficulty with the no action clause defense. It found that the problem presented was a procedural one. The court relied upon Moore's Federal Practice, which states the proposition that "third party practice may accelerate the accrual of a right, and its objectives would be defeated if a no action clause were held to make . . . [it] . . . inapplicable."[50]

In the unreported case of *Gabriel v. United States*,[51] the insurer attempted to avoid the *Vaughn* result by enlarging its no action clause. The first portion of the no action clause in *Gabriel* was substantially identical with that recited above, and the enlargement was as follows:

> Any person or organization or legal representation [sic] thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative.[52]

The court, following the same path as *Vaughn*, found no basis in the enlarged portion of the clause to distinguish the *Vaughn* case. Thus, it seems clear that procedural roadblocks, such as the no action clause, will be ineffective to deny protection to the United States.

The foundation for what has now become a predictably uniform result is an uncomplicated proposition which has a great deal of merit. The insurance companies faced with the problem assert that they only become liable as their insured becomes liable; if the is insulated then so should the insurer be insulated. The answer is that the federal government *is* an insured by virtue of the usual omnibus clause; hence, it derives its protection from the contract.

This posture should be appealing from the standpoint of both

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[48] *Id.* at 31.
[49] 225 F. Supp. 890 (W.D. Tenn. 1964).
[50] 3 MOORE, FEDERAL PRACTICE, ¶ 14.12, at 575 (2d ed. 1963).
[51] Civil No. 64–C-3-D, W.D. Va., 18 January 1965.
[52] *Ibid.*

its simplicity and its uniformity. However, it does seem to take little note of the exclusive remedy amendments. Most of the cases cite only *Irvin v. United States*,[53] an unappealed decision rendered almost five years before the amendments, as the sole or principal authority for their holding that the United States is an insured. The result, if legally and logically sound, seems to represent a windfall for the government, to say the least.

D. *CONTRACT RIGHTS OF INSURER V. STATUTORY DUTIES OF ATTORNEY GENERAL*

> It is well settled that if the potential loss is within the limits and coverage of the policy and the insurer accepts liability therefor, by agreeing to defend the claims or suits against its assured, and to pay the losses when established, the insurer is accorded the absolute control of the litigation. It may elect to compromise and settle the claims before suit is filed or after, or it may elect to defend in the name of the assured, and the exercise of its discretion is not subject to challenge by the assured.[54]

Contrast this general principle of insurance law with the compromise section of the FTCA: "The Attorney General, with the approval of the Court, may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon."[55]

It has been held that coverage under the omnibus clause of the insurance policy of another does not create an independent contract between the insurer and the additional insured,[56] and that the additional insured under such coverage is subject to all limitations which bind the original insured.[57]

In *Nistendirk v. United States*,[58] the insurer apparently abandoned the somewhat routine defense to its indemnification of the United States—*i.e.*, reliance on the 1961 amendments—and urged two constitutional grounds. The insurance company complained that it had been denied the right of a trial by jury, and that its right of contract had been impaired by the inclusion of the United States as an insured. The court, in an apparent expression of

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[53] 148 F. Supp. 25 (D.S.D. 1957).
[54] Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 626 (10th Cir. 1942).
[55] 28 U.S.C. § 2677 (1964).
[56] See Ohio Cas. Ins. Co. v. Goodman, 163 Okla. 243, 22 P.2d 997 (1932).
[57] Bernard v. Wisconsin Auto. Ins. Co., 210 Wis. 133, 245 N.W. 200 (1932).
[58] 225 F. Supp. 884 (W.D. Mo. 1964).

sympathy, agreed that there should be entitlement to a jury trial as a matter of policy, but stated that it just does not exist as a matter of constitutional right.[59] The court also found that there had been no impairment of the insurer's right to contract by inclusion of the United States as an insured under the omnibus clause of the insurance policy of the employee. The basis for this holding was that the insurer selected the language of the contract and could have excluded the United States had it so desired. Since it failed to exclude the United States, the insurer must fulfill its obligation.[60]

The matter of the potential conflicts between the statutory duties of the Attorney General and the control reserved to the insurer by the policy are discussed somewhat in the recent case of *Adams v. United States*.[61] The opinion merely recognized the existence of the conflicts, but the court found them not insurmountable and held that they do not rule out the United States as an insured under its employee's policy.

Under the conditions section of automobile insurance policies, there is normally contained a clause of the following import:

> *Assistance and Cooperation of the Insured.* The insured shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of suits and in enforcing any right or contribution or indemnity against any person or organization who may be liable to the Insured because of bodily injury or property damage with respect to which insurance is afforded under this policy; and the Insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. *The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense other than for first aid to others at the time of the accident.* [Emphasis supplied.]

It is safe to say that the dilemma created by the contract language quoted above, as opposed to the statutory duties of the United States Attorney General has not been satisfactorily answered by judicial opinion. The only serious consideration given to it was by the court in *McCrary v. United States*.[62] Two quotes from that case serve to further frame the problem: "The obligation of the [insurer] . . . to defend its insureds and to pay any

[59] *Id.* at 885.
[60] *Id.* at 885–86.
[61] 241 F. Supp. 383 (S.D. Ill. 1965).
[62] 235 F. Supp. 33 (E.D. Tenn. 1964).

judgment rendered is primary and paramount; '* * * consequently, its right to control the litigation is first and paramount * * *.' "[63] And,

> The concept of indemnity underlies all, but life, insurance policies; and under the common law, in order to render a judgment against the indemnitee binding on the indemnitor, the defendant was required to notify the indemnitor of the action and offer the indemnitor control of the defense as to the merits of the defendant's liability.[64]

The court in *McCrary* obviously believed that the conflicts between the general principle quoted above and the statutory obligations placed upon the Attorney General with regard to control of defense, settlement, and compromise were enough to preclude extension of policy coverage to the United States. However, it must be remembered that the author of the *McCrary* opinion called his remarks a dissent, and that the case actually held contrary to the contentions of the insurance company.

In *Rowley v. United States*,[65] discussed earlier, the effect of having the United States as an insured under the omnibus clause of its employee's insurance policy was realistically brought into focus. The insurance company was denied the benefit of the compromise it had worked out with the United States. It should be remembered that this particular compromise involved a sharing between the insurer and the United States of damages claimed by a third party, and that it came about because of a doubt whether or not the United States was an insured under its employee's policy. No case has been discovered which has decided the propriety of a settlement between the insurer and the injured party with the United States as an additional insured.

Presumably, the insurance company could find itself at a considerable disadvantage, if required to relinquish such a strategic matter as settlement authority to the Attorney General and the federal district court. It can certainly be argued that the insurer and its attorneys, whose everyday activities involve the defense, compromise, and settlement of automobile liability claims, are far better trained and motivated for such duties.

The present judicial approach to this conflict between policy

[63] *Id.* at 37, quoting in part from Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 626 (10th Cir. 1942).
[64] *Ibid.*
[65] 140 F. Supp. 295 (D. Utah 1956).

provisions and the statutory duties of the Attorney General is susceptible of criticism from a more basic standpoint. When the United States consented to be sued in tort, it had the sovereign advantage of doing so on its own terms. It chose, and who can say but wisely, that its courts would decide its cases without juries, for example, as well as approve settlements. There can be little doubt that these measures represented safeguards for the protection of the public treasury. Such safeguards do not seem apprporiate when the ultimate pocket that satisfies the judgment is that of the insurer rather than the public treasury.

IV. THE CERTIFICATION PROBLEMS

A. *MANDATE OR NOT?*

The language of 28 U.S.C. § 2679(b) provides that a suit against the United States under 28 U.S.C. § 1346(b) is the exclusive remedy for the plaintiff in tort whose injuries arise from the operation of a motor vehicle by a government employee acting within the scope of his employment. Section 2679(c) provides for the employee's defense by the Attorney General, and section 2679(d) provides for removal to a federal court of such an action, if originally brought in a state court, provided the Attorney General certifies that the employee was acting within the scope of his employment. After removal the action becomes one against the United States under the FTCA.

The most interesting questions arise when the action is brought initially in the state court against the employee. One might suppose that the Attorney General's duty is clear under the statute; however, as a matter of fact, the practice indicates that this may not quite be true.

In *Gustafson v. Peck*,[66] a case involving a routine factual situation, the United States intervened in an action originally brought in the state court of Iowa and petitioned for removal, based upon a certification of scope by the Attorney General alleging that "the Government has an obligation to intervene . . . ."[67] Just how "obliged" the government is, and by what standards such an obligation is to be tested, was not the subject of the court's attention.

[66] 216 F. Supp. 370 (N.D. Iowa 1963).
[67] *Id.* at 371.

The next appearance of this topic was in the case of *Adams v. Jackel*,[68] where the United States attorney certified that he was "of the opinion" that the government operator "was acting within the scope of his employment as an employee of the United States at the time of such incident."[69] The problem area came slightly more into focus upon the motion of the government employee to have the case against him dismissed. The motion to dismiss was denied by the court, and the reasoning was that, in order for the United States to be liable, the government must *in fact* be liable under the theory of *respondeat superior*. A mere allegation of scope of employment does not resolve this element of the government's liability, even though it may be conclusive with regard to the issue of removal.[70] Thus, the question of scope of employment would appear to be a fact question for resolution by the court as a prerequisite to judgment against the United States even under the 1961 amendments to the FTCA.

The vagaries of the matter of scope of employment certification were not put to rest by the *Adams v. Jackel* opinion. Consider the case of *Stephan v. Madison*,[71] which involved a fact situation more germane to the question of automobile insurance. Suit was originated in a state court by the plaintiff against the government employee, who was operating a government-owned vehicle at the time of the accident. Counsel for the United States provided the scope of employment certification pursuant to 28 U.S.C. § 2679(d), and the case was removed to the federal district court. After removal, the government was allowed to implead Government Employees Insurance Company (GEICO), the liability carrier of the government driver. Government counsel urged that the United States was an insured under the policy as a "person or organization legally responsible for the use of [the] . . . automobile . . . ."[72] The court held that the United States was not an insured, because coverage extended, by the terms of the policy, to automobiles not

[68] 220 F. Supp. 764 (E.D. N.Y. 1963).
[69] *Id.* at 765.
[70] It should be noted that the government employee in *Adams v. Jackel* was driving a government vehicle at the time of the accident, and the question of automobile insurance was not involved. See Atnip v. United States, 245 F. Supp. 386 (E.D. Tenn. 1965).
[71] 223 F. Supp. 256 (E.D. N.Y. 1963).
[72] *Id.* at 258.

owned by such organization. Foiled in its attempt to underwrite possible United States liability by the insurance coverage of its employee, counsel for the United States sought the court's permission to withdraw its certification of scope of employment, contending that it had issued the certificate only because GEICO had refused to defend the employee in the state court. The following language of the court is of interest:

> Surely government's counsel, having sworn in the certification that this accident occurred in the course of Madison's employment, is not now, without any new evidence appearing to the contrary, prepared to refute that conclusion. So long as this be true, the United States is under a statutory obligation to maintain the defense of this suit in this court. As its own memorandum states:
>
> > The Department of Justice has construed the provisions of 28 U.S.C. 2679(d), as amended, to *mandate* the defense of any suit against an employee, through the removal procedure authorized by subsection (d) thereof, and the payment of any judgement thus obtained. (emphasis added)
>
> Thus, GEICO's refusal to defend Madison in the state court was not the "only" reason that the goverment removed this action; certainly the admitted Congressional mandate was of no less compulsion. The government requests that it be permitted to withdraw its certification and that this case be remanded to the state court are denied.[73]

Although the holding is seemingly contra to *Adams v. Jackel* on the question of the meaning and effect of the scope certification, it is believed that any distinction is superficial at best and, in fact, may not exist at all. The first sentence of the above-quoted language of the court, and especially the words "without any new evidence," would appear to leave the decision open to eventual compatibility of the two cases. It would seem only reasonable that, at the trial on the merits, should it appear that Mr. Madison were not in fact operating the automobile in the course of his employment, then the absence of the *respondeat superior* principle would preclude government liability under the FTCA.

Some support for this hypothesis is contained in the most recent case on the subject, *Atnip v. United States*.[74] That case involved a rural mail carrier who had made what was apparently a slight deviation from his mail route to pick up some eggs which

[73] *Id.* at 259.
[74] 245 F. Supp. 386 (E.D. Tenn. 1965).

he had previously bought.[75] The question of scope of employment arose upon a motion by the plaintiff to remand the case to the state court, where suit had originally commenced prior to the issuance of the scope certificate by the government. The court denied the motion to remand on the evidence of the pretrial deposition of the government employee, it appearing that the deviation was not sufficient to preclude the accident occurring within the scope of employment. It is clear, however, that this decision on the question of scope of employment was for the purpose of the remand motion, and a different result on the question could be obtained at trial.

However, the more interesting question whether the government is required, under the present statutory scheme, to defend its employees when sued in a state court for torts arising out of accidents occurring in scope of employment, is certainly not free from doubt. As an example of the uncertainty which exists in this area, consider the effect of the Attorney General's control of scope certification upon the insurer of a government employee. By merely failing to issue the certificate in a suit brought in a state court against the insured employee, the Attorney General leaves the insurance company with little choice but to defend the suit, even though the action arose out of a scope of employment accident. This would be advantageous to the government, particularly if the insurer has had the foresight to exclude the United States from its omnibus clause protection. In situations where the United States is covered by the omnibus clause of its employee's policy, the Attorney General could issue the scope certificate impunibly, causing removal to the federal court, with suit against the United States under the FTCA and any judgment to be paid by the insurance company.

At best, it appears that the 1961 amendments provided only the means by which the employee *might* be aided, provided the Attorney General (or the United States attorney for the district involved) decides within his discretion to issue the scope certificate within the meaning of 28 U.S.C. § 2679(d). Section 2679(b) maintains that suit against the United States is the only remedy

[75] The government employee in this case was operating a vehicle owned by the United States at the time of the accident. The question of automobile insurance protection is not involved in the decision.

available, and section 2679(c) begins, "The Attorney General shall defend. . . ."; however, no way is seen to bring these sections to bear without the certification provided for in section 2679(d). The "mandate" suggested by the court in *Stephan v. Madison*[76] was, of course, and admitted one for the purposes of the litigation. It was a "mandate" suggested by the government in its motion to obtain removal when it believed GEICO to be ultimately liable, and used by the court to preclude remand when the contrary was established. For lack of statutory guidance or judicial authority, one is left to speculate about the fate of Mr. Madison, the government employee, had government counsel more carefully read the terms of the insurance policy prior to issuing the certification of scope. It is suggested that some implement should be placed in the hands of the government employee to assure the protction intended in the amendments to the FTCA.

The end result of this lacuna in the statute was of significant interest to one Sergeant Coffey, who was operating a truck owned by the federal government at the time of an accident. The story of Sergeant Coffey is related by a judge in a state court of Louisiana.[77] Upon suit in the state court for damages to the plaintiffs, Sergeant Coffey was represented by the United States attorney for the particular district, it being made clear, however, that the United States was not to be considered a party to the action. A motion was made on behalf of Coffey to dismiss the state court action as to him, alleging that he was acting within the scope of his United States government employment[78] and that plaintiff's exclusive remedy under 28 U.S.C. § 2679(b) was suit against the United States. In denying the motion, the court concluded that no immunity exists prior to the certification of scope by the Attorney General required by 28 U.S.C. § 2679(d).

Query, then, the extent to which this prophesy from the legislative history of the 1961 amendments to the FTCA has been fulfilled:

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[76] 223 F. Supp. 256 (E.D. N.Y. 1963).

[77] Jarrell v. Gordy, 162 So.2d 577 (La. 1964).

[78] There is nothing contained in the case report to suggest that Sergeant Coffey was not acting within the scope of his employment at the time of the accident. Nor is there any suggestion as to why the United States attorney undertook Coffey's defense, or why a scope certificate was not issued. It appears that government counsel conceded, in fact urged upon the court, the proposition that Coffey was acting within the scope of his employment.

The enactment of this amendment for the protection of the Government driver would afford the relief desired by him, for there would be then no point in his spending his own funds to take out liability insurance to protect him while operating motor vehicles in the scope of his employ- for the Government.[79]

B. *JUDGMENT AS A BAR AS AFFECTED BY THE SCOPE OF EMPLOYMENT QUESTION*

28 U.S.C. § 2676. Judgment as bar.

The Judgement in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Given the quoted language of the statute, consider a hypothetical plaintiff who begins suit in a state court against a negligent government employee. The Attorney General issues a certificate to the effect that the defendant was acting within the scope of his employment at the time of the accident, and the action is removed to the appropriate federal district court. In a trial before the court on the merits, verdict is given for the United States, the reason being that the government employee was not acting within the scope of his employment at the time of the accident. Add the ingredient of an impleaded insurer of the employee, whose policy contained the omnibus clause which has been held to include the United States as an additional insured. Section 2676[80] says the judgment shall constitute a *complete* bar to any action against the employee, and there is nothing to suggest that this rule would be affected by the fact that judgment in this hypothetical situation is the result of a finding that the employee was not acting in scope of employment, notwithstanding the issuance of a scope certificate. The interesting possibility exists that the insurance company would receive undeserved insulation, and the plaintiff would be barred from an otherwise meritorious claim against the insured employee.

Although the reported cases do not quite reach the situation posed by the hypothetical proposition above, there are several decisions which would seem to indicate the probable result. In *Gustafson v. Peck*,[81] the plaintiff sought to remand a case re-

[79] 2 U.S. CODE CONG. & AD. NEW 2784, 2791 (1961).
[80] 28 U.S.C. § 2676 (1964).
[81] 216 F. Supp. 370 (N.D. Iowa 1963).

moved under § 2679(d) to the state court in which suit had been brought originally. In denying the motion, the court used these words: "Remand is only allowed *when it is determined* that the employee was not within the scope of his Federal employment at the time the tort was committed."[82] (Emphasis supplied.) This language, of course, falls far short of resolving the hypothetical problem, which presumes a final verdict in favor of the United States based upon the fact that the employee was not acting within the scope of his employment at the time of the accident.

However, in the case of *Tavolieri v. Allain*,[83] the court came closer to an answer to the posed problem. In that case, after removal on certification of scope of employment by the United States attorney, a hearing was had by the trial court, at which government counsel argued that the case should be remanded to the State court.[84] The court considered the procedure available to it to decide the question of scope as it bore on the motion to remand, concluding that it could review the pleadings filed in the state court and the papers connected with the removal to see if the answer is available on the fact of these documents. Further, if that were not sufficient, the court decided that it could take testimony to determine the matter. The court concluded its discourse on the question of remand after an erroneous removal with these words: ". . . and not to permit remand would cause plaintiff to lose his opportunity to sue the employee personally."[85] This result is certainly consistent with the obvious intent of the statute as it might reasonably be read. The insulation and protection to be afforded to government employees is only for accidents arising out of the scope of their federal employment and, of course, is not intended merely to provide a procedural means to destroy an otherwise valid cause of action which the plaintiff might have.

Plaintiffs and their counsel who might be lulled by the above quoted language should test such altruism and should be wary.

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[82] *Id.* at 373.

[83] 222 F. Supp. 756 (D. Mass. 1963).

[84] The basis for the government's motion to remand was that the facts of the case were such that, under the law of Massachusetts, a private employer would not have been liable, hence a remedy by suit against the United States is not available within the meaning of the language of 28 U.S.C. § 1346(b).

[85] Tavolieri v. Allain, 222 F. Supp. 756, 759 (D. Mass. 1963).

The plaintiff in the case of *Hoch v. Carter*[86] faced an interesting, albeit not quite analogous, problem. A suit for damages for injuries arising out of a scope of employment motor vehicle accident was brought against the employee in a state court two years and three days after the incident. After certification by the Attorney General, the case was removed to federal court, where, over the objection of the plaintiff, the United States was substituted as the sole defendant. The dismissal of the case against the employee in this situation was of more than academic interest, as the United States promptly asserted the FTCA statute of limitations[87] of two years, which precluded the plaintiff from recovering from anyone, even though the state statute of limitations was 3 years and the original action in state court had been timely. The result was the insulation of the employee from further proceedings in any court. The basis for the court's decision, interestingly enough, was its assertion that, under section 2679(b), once scope of employment is conceded as it was in this case, there is no remedy against the government employee. The remedy is one exclusively against the United States,[88] whether or not a scope certificate is ever issued.

It should be noted that in *Hoch v. Carter*, the government employee was operating a government truck, and the question of insurance was not present. However, hypothetically adding insurance to the facts creates an interesting situation. Had there been insurance, the insurer would have been the ultimate beneficiary of the removal and assertion of the federal statute of limitations by the Attorney General; and this would be in the nature of a windfall for the insurance company, especially since the state court action against the employee was timely brought. The Attorney General appears to have complete freedom to take into consideration the facts of each case and to decide the question of scope certification, influenced by whatever factors appeal to him. There is nothing in the exclusive remedy amendments to preclude the Attorney General from considering the presence or absence of

[86] 242 F. Supp. 863 (S.D.N.Y. 1965).

[87] 28 U.S.C. § 2401(b) (1964).

[88] Hoch v. Carter, 242 F. Supp. 863, 866 (S.D.N.Y. 1964). This conclusion, although it would appear warranted by the language of § 2679(b), is not given effect by other court decisions. See Gustafson v. Peck, 216 F. Supp. 370 (N.D. Iowa 1963), and Jarrell v. Gordy, 162 So.2d 577 (La. 1964).

insurance as a factor in this decision whether to interject the United States into the case.

V. ADMINISTRATIVE ASPECTS OF THE UNITED STATES AS AN INSURED UNDER THE INSURANCE POLICY OF ITS EMPLOYEE

A. *GENERAL*

In view of the fairly well settled proposition that the United States is an additional insured under the usual omnibus clause of its employee's policy, the next logical step would seem to concern itself with the possible administrative application of such protection.

The heads of federal agencies have been given authority by statute[89] to settle claims under the FTCA. The subject matter of such claims settlement authority is coextensive with the subject matter of the tort suit provision contained in 28 U.S.C. § 1346(b). Such claims must be based upon damages arising out of the negligence or wrongful act of a government employee acting within the scope of his employment. Settlements in excess of $25,000 may be accomplished only with the prior written approval of the Attorney General or his designee. Further, a claim must be presented to and denied by the appropriate federal agency before suit may be filed against the government.

The heads of federal agencies, under the statutory delegation to settle claims, do so under regulations[90] designed to implement both the substantive[91] and the procedural[92] aspects of such claims.

The problem hypothesized here is whether a claims administrator, under authority granted to him by his agency head, may utilize the protection of the tortious employee's insurance policy.[93] The concept has implications which are legal, procedural, and perhaps even political.

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[89] 28 U.S.C. § 2672 (1964), as amended, 28 U.S.C.A. § 2672 (Supp. 1966).

[90] References to administrative regulations for the purpose of this discussion will be those promulgated by the Department of the Army.

[91] Army Reg. No. 27-22 (20 May 1966) [hereinafter cited as AR 27-22].

[92] Army Reg. No. 27 20 (20 May 1966) [hereinafter cited as AR 27-20].

[93] In fact, the possibility exists that such utilization may be required upon consideration of the often repeated rule that no officer of the government may surrender a right vested in or acquired by the government under a contract. See Simpson v. United States, 172 U.S. 372 (1899); 20 COMP. GEN. 703 (1941).

B. *UNDER CURRENT ADMINISTRATIVE REGULATIONS*

The Department of the Army's procedural regulations take cognizance of the possibility of the presence of its employee's insurance by requiring a deduction from the amount claimed equal to the amount of any payment the claimant may have received from the insurer of the employee upon whose negligence the claim is based.[94] This provision, however, is no doubt based upon the proposition that to allow the contrary would be to permit the claimant to collect twice for the same injury. The substantive regulation does not mention automobile liability insurance at all.

In the absence of guidance regarding procedure or policy, however, there exists the possibility that the claims administrator could utilize his ingenuity to obtain the insurance protection granted by the courts in the cases previously discussed. His solution might be merely to refuse entertainment of a claim, where omnibus clause protection covers the United States, until all remedies have been exhausted against the insured employee. There would seem little doubt, in the ordinary situation, that the insurer would have no alternative but to pay the claim against its insured negligent employee, and this would be true without regard to the status of the United States under the employee's policy.

The only obvious flaw seen in such a procedure involves a matter of policy. Current regulations require that claims against the government be "expeditiously settled."[95] There is also this language contained in the regulations: "If the claim is of a type and amount within the jurisdiction of the approving authority and the claim is meritorious in the amount claimed, it will be approved for payment."[96]

The sophisticated problems of *respondeat superior* and the construction of omnibus clauses will be of little concern to the ordinary claimant. Nor will it matter that his claim is equally valid whether pressed against the United States alone or paid from the pocket of the insurance company which must protect the employee it insures. The claimant will desire quick recovery from the most readily available source.

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[94] AR 27-20, para. 17*b*(2).
[95] AR 27-20, para. 1.
[96] AR 27-20, para. 14*b*.

C. *SETTLEMENT WITH CLAIMANT UNDER CLAIMS REGULATIONS FOLLOWED BY PROCEEDINGS FOR REIMBURSEMENT AGAINST INSURER*

Another possibility for the resourceful claims administrator—and one taking consideration of the policy objection noted in Part V.A. above—would be settlement of a meritorious scope claim followed by suit by the United States against the insurer for reimbursement. If otherwise feasible, policy considerations concerning prompt settlement could be satisfied without loss of a valuable, though somewhat fortuitous, right.

The right of the government to take such action involves several legal principles. Where omnibus clause coverage exists, the insurance company has liability respecting an additional insured which is independent of its contractual duty to the named insured.[97] But, as previously discussed, the assistance of the insured—meaning now the additional insured—is required, and he is forbidden to make settlements except at his own expenses.[98] An additional insured is subject to any limitations which would bind the named insured.[99]

The problems posed by these restrictions are not insurmountable. However, it would appear that, as a predicate to eventual reimbursement by suit, the claims administrator would have to offer control and settlement of the claim to the insurer and obtain the insurer's denial of liability prior to any administrative settlement.[100] With this condition, the refusal of the insurer to defend or to settle a claim of potential liability would be at its own risk,[101] as the right to effect settlement benefits the insured as well as the insurer.[102] The insured then would be released from the proscription against settlement without the insurer's consent,[103] and the amount paid in settlement of the claim could be recovered in a suit

[97] See Odden v. Union Indem. Co., 156 Wash. 10, 286 P. 59 (1930).

[98] See the assistance clause discussed in Part III.D. above.

[99] Ohio Cas. Ins. Co. v. Goodman, 163 Okla. 243, 22 P.2d 997 (1932).

[100] *Cf.* Municipal Serv. Real Estate Co. v. D. B. & M. Holding Corp., 257 N.Y. 423, 178 N.E. 745 (1931).

[101] Cf. Cadwallader v. New Amsterdam Cas. Co., 396 Pa. 582, 152 A.2d 484 (1959).

[102] See Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8 (1958).

[103] See Hardware Mut. Cas. Co. v. Hilderbrandt, 119 F.2d 291 (10th Cir. 1940); Nixon v. Liberty Mut. Ins. Co., 255 N.C. 166, 120 S.E.2d 430 (1961).

against the insurer.[104] Any settlement would be subject to a test of reasonableness.[105] No express statutory authority would appear to be required to utilize this method, as there is no statutory prohibition against litigation of this sort by the Attorney General.[106] This method would make full use of the protection afforded by the employee's insurance and would still allow fairly prompt settlement of claims by the government. Some additional processing time can be anticipated both in offering settlement power to the insurer and in documenting denial of liability by the insurer.

VI. CONCLUSIONS

Any general conclusions or criticisms of the judicial construction of the operation of the FTCA, as amended in 1961, and its application with regard to private insurance coverage, must be considered with certain ground rules. The first is obvious from a glance at the cases cited in this article. With but two exceptions,[107] every opinion cited or discussed as fitting the typical fact situation described in Part I is an opinion of a federal district court. These opinions are brief and of the memorandum type. More often than not, the decision records only the answer to an interlocutory dispute between the parties, and usually the dispute is a procedural matter involving some facet of federal third party practice. The dearth of appellate authority probably indicates that the plaintiff's damages were not great. This suggestion is not verifiable in the case reports, but it has some support in the pre-1961 experience as reflected in the legislative history of the exclusive remedy amendments.[108]

The first and primary conclusion is the most obvious one. The United States is an insured under ordinary omnibus clause coverage in its employee's insurance policy. From simply reading the language of such a clause, it is difficult to find fault with the principle that the United States is covered. Somehow—and perhaps any such distinction is semantic—this result seems not quite

[104] Traders & Gen. Cas. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621 (10th Cir. 1942).

[105] See W. I. Anderson & Co. v American Mut. Liab. Ins. Co., 211 N.C. 2, 188 S.E. 642 (1936).

[106] See Halbach v. Markham, 106 F. Supp. 475 (D. N.J. 1952).

[107] Government Employees Ins. Co. v. United States, 349 F.2d 83 (10th Cir. 1965); Uptagrafft v. United States, 315 F.2d 200 (4th Cir. 1963).

[108] See 2 U.S. CODE CONG. & AD. NEWS 2784 (1961).

as reasonable after the passage of the exclusive remedy provisions of the FTCA. This feeling is somewhat fostered by the fact that plans for the U.S. government to purchase liability insurance for its drivers were considered and rejected prior to the adoption of the 1961 amendments. While certainly not conclusive, this fact suggests the possibility that the 1961 amendments represent the Congress' intent that the United States be self-insured with regard to the type of accident now covered by the FTCA, as amended.

Another somewhat intangible and inharmonious thought involves an attempt to square government protection of its employees under the doctrine of *respondeat superior* with omnibus clause protection of an additional insured with which no such doctrine is connected. The U.S. government's duty to its employee under the FTCA is predicated upon the presence of its vicarious liability. Omnibus clause protection extends to a number of classes and persons including employers. Although liability of the named insured is not a prerequisite to protection of an additional insured under the omnibus clause,[109] it is suggested that the inclusion of "a person or organization legally responsible"—that is, an employer—takes cognizance of the rule that employers generally may be indemnified at the expense of their tortious employees.[110] The fact that the government may not exercise this general prerogative under the FTCA[111] creates the feeling of lack of harmony.

The more fundamental difficulty in the situation lies in the conflict between the contract rights of the insurer and the statutory duties conferred upon the Attorney General by Congress. These conflicts have been discussed both in this study and in *Adams v. United States*:[112]

> Though there is logic in much said through the dissenting voice of Judge Neese in McCrary relative to the potential conflicts between the duties of the Attorney General to defend and the policy provision which gives the insurer complete control of the defense of claims, I do not see these conflicts as insurmountable obstacles. . . .[113]

It may be concluded that, as to insurers who write policies on

[109] Odden v. Union Indem. Co., 156 Wash. 10, 286 P. 59 (1930).

[110] See Porter v. Norton-Stuart Pontiac-Cadillac of Enid, 405 P.2d 109 (Okla. 1965).

[111] United States v. Gilman, 347 U.S. 507 (1954).

[112] 241 F. Supp. 383 (S.D. Ill. 1965).

[113] *Id.* at 385.

government employees, there is no problem. The United States is an insured, and that is that. However, it seems the employee is in a bit of a dilemma. Just as the judge in *Irvin v. United States*[114] applauded the government employee who carried insurance to protect his employer, intermediate dignitaries in government agencies might also be inclined to be considerate of those who protect their employer.

However, the real horn of the employee's dilemma lies in the certification of scope practice of the Attorney General and in the apparent inability of the employee to require at least a hearing on the question of scope of employment. It seems unrealistic to leave the triggering device for this beneficial protection where it has been placed. It is al well and good to discuss the government's mandate to defend its employees; but, as pointed out previously, this is a discretionary mandate and is a solution largely dependent upon the providential attitude of the Attorney General. In *Stephan v. Madison*[115] *and Jarrell v. Gordy*,[116] it was seen that this discretionary mandate may be statute would be to allow removal from the state court upon the flavored by influences other than the issue of scope of employment.

A more reasonable alternative to that presently existing in the motion of the defendant-employee for a preliminary hearing before the federal district court on the question of scope of employment. No objection is seen to leaving the matter of the defense of the employee by the United States to the discretion of the trial judge, dependent upon his initial determination on the scope question. If felt necessary, this proposal could be balanced with a provision allowing the federal trial judge to assess costs, when it appears that the employee's allegation of scope was frivolous, and where his actions were, in fact, clearly outside the scope of his employment.

Without some additional protection for the employee as suggested, the employee appears to be to some extent in the uncertain position in which he found himself prior to the 1961 amendments to the FTCA. A prudent employee today certainly would deem himself insecure without personal automobile liability insurance.

[114] 148 F. Supp. 25 (D. S.D. 1957).
[115] 223 F. Supp. 256 (E.D.N.Y. 1963).
[116] 162 So.2d 577 (La. 1964).

To a certain extent, then, it would seem that the intention of Congress to preclude the necessity for the purchase of automobile liability insurance by federal employees in scope of employment situations has been frustrated.

It is certainly arguable that, since the insurance company chooses the language of its policy, including the omnibus clause, it need not include the United States as an additional insured. The following is a sample clause recently received from and currently in use by one of the automobile liability insurance companies regularly doing business with federal employees:

> It is agreed that the policy does not apply under the Liability Coverages to the following as insureds:
>
> 1. The United States of America or any of its agencies;
> 2. Any person, including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the United States Government while acting within the scope of his office or employment, if the provisions of section 2679 of Title 28, United States Code (Federal Tort Claims Act), as amended, require the Attorney General of the United States to defend such person in any civil action or proceeding which may be brought for such bodily injury or property damage, whether or not the incident out of which such bodily injury or property damage arose has been reported by or on behalf of such person to the United States or the Attorney General.

Apparently an exclusion such as that quoted above is also now in effect in all automobile liability insurance policies issued in Texas.[117]

A careful reading of the quoted clause leads to the conclusion that both the United States and the employee would be without protection in a situation where the Attorney General is *required* to defend. Judicial construction of this *requirement*, it is presumed, would be undertaken in a state, rather than a federal, court and would arise in a first party suit by the insured against his insurer, contesting denial of coverage in an apparent scope of employment accident, based upon the fact that the Attorney General was *required* by 28 U.S.C. § 2679 to defend the case but did not.

It is not known whether the automobile insurance industry as a whole has reacted to exclude the United States in a similar fashion; however, such a reaction would not be surprising. It is

[117] Myers v. United States, 241 F. Supp. 515, 519 n.4 (N.D. Tex. 1965).

felt that any widespread administrative use of omnibus clause protection, as discussed earlier, would certainly provide an incentive for the adoption of clauses excluding the United States from such coverage.[118]

With a clause as that quoted above in his policy, it is conceivable that the insured employee would have less protection than he had prior to the 1961 amendments to the FTCA. This hopefully unlikely premise hypothesizes a situation where the Attorney General refuses to certify as to scope of employment, and the insurer refuses protection under the policy, contending that government defense of the action was required. To preclude this possibility, the following amendment (f) to 28 U.S.C. § 2679 is proposed:

> In the event of a disagreement between the Attorney General and the defendant government employee regarding the Attorney General's determination regarding the certification provided for in subsection (d) of this section, any action brought in a state court which is alleged by the defendant to have arisen out of an act or acts within the scope of federal employment, may be removed by the defendant to the district court of the United States for the district and division embracing the place where such action is pending.

As previously mentioned, the motivation behind the exclusive remedy amendments to the FTCA was the protection of the government driver, with the intention being that it would no longer be necessary for him to purchase automobile insurance to protect him in his government duties. It is suggested that the proposed amendment, or one of like import, is necessary to achieve the result intended by Congress. In view of the fact that the insurance industry might act generally to exclude protection to government employees for scope of employment accidents, the added protection of a triggering device in the hands of the employee would preclude the ludicrous possibility that the government employee now has less protection than he had prior to the passage of the exclusive remedy amendments.

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[118] Query whether the heads of executive departments of the government could, by directive, proscribe purchase of such policies by government drivers. See Royal Standard Ins. Co. v. McNamara, 344 F.2d 240 (8th Cir. 1965).

STATE POWER TO TAX THE SERVICE MEMBER: AN EXAMINATION OF SECTION 514 OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.*

I. INTRODUCTION

Section 514[1] continues to be the most frequently invoked section of the Soldiers' and Sailors' Civil Relief Act,[2] as well as its most controversial. Several reasons for this could be suggested. The simple explanation, however, lies in the fact that states need revenue and, to the extent permissible, are understandably determined to include service members among the clientele named on the tax rolls; but the serviceman—who, under section 514, has been granted a measure of federal immunity from state taxation—is justifiably anxious to assert his protected status. The result in many cases is a real or apparent clash of federal and state authority, with the serviceman-taxpayer as the protagonist in the conflict. It should be added, however, that the controversy is generally short-lived, with its resolution in most cases found in an informal opinion of a city or county attorney, or perhaps a more formal issuance by the state attorney general. Relatively few cases ever reach a court, and even fewer are appealed. The apparent explanation of this relative lack of judicial activity is that, even in those cases where the serviceman can afford to bring suit, the cost of litigation generally exceeds that of the tax. In one sense this is unfortunate, for the reported cases bear out the conclusion that the member who goes to court (and appeals, if necessary) is, by and large, highly successful.

This comment on section 514 is expository in nature and is offered with the hope of affording interested persons an easy, prac-

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] 56 Stat. 777 (1942), as amended, 50 U.S.C. App. § 574 (1964).

[2] 54 Stat. 1178 (1940), as amended, 50 U.S.C. App. §§ 501–48, 560–90 (1964). The act has been extended until such time as it is "repealed or otherwise terminated" by act of Congress. 62 Stat. 623 (1948), 50 U.S.C. App. § 464 (1964).

tical reference in the area. It is also the author's wish that it contribute to consistent administrative decisions by military and civilian officials who have the difficult task of effecting the final nonjudicial adjustment between the soldier and the state taxing authority.

Since an appropriate starting point for the examination of a statutory subject is the statute itself—particularly where, as here, its precise wording is often critical—section 514, entitled "Residence for tax purposes," is reprinted in full below:

> (1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: *Provided*, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.
>
> (2) When used in this section, (a) the term "personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Pro-*

vided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid.[3]

The discussion which follows is segmented into various subparts, each of which is devoted to a particular tax or—toward the end of the comment—a particular problem area. Unless otherwise noted, the assumption is that the serviceman is stationed in a state other than his home state (state of domicile). The state in which the soldier is stationed is referred to as the "host state" or "state of station," while the state in which he is a domiciliary is referred to as his "home state" or "state of domicile."

II. INCOME TAX

A. *THE EXTENT OF STATE TAXING POWER UNDER THE UNITED STATES CONSTITUTION*

Before discussing the effect of section 514 upon state income taxes, it might be helpful to examine briefly the extent to which a state may constitutionally levy a tax upon income. Here, an important distinction must be made, for a state's taxing power over its residents is far greater than that which it may exercise over nonresidents. With regard to *resident* individuals, it appears that a given state has the power to tax *all income, from whatever source derived.*[4] On the other hand, a state's power to tax the income of *nonresidents* is limited to *income derived within the state,*[5] either through the performance of services within the taxing state's boundaries or through the ownership of property there.

The obvious question is, then, how does one become a resident for purposes of state taxation? Although the answer in any given case must be determined by searching the code and regulations of the state concerned, it is fair to say that state codes, by and large, embody a similar approach. Generally, a resident is statutorily defined as an individual who *either* is a domiciliary of the state *or* has been physically present in the state for a stated period of time (usually 6 to 10 months).[6] Conversely, simple deduction

[3] 56 Stat. 777 (1942), as amended, 50 U.S.C. App. § 574 (1964).

[4] See New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937); Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

[5] See New York *ex rel.* Whitney v. Graves, 299 U.S. 366 (1937); Shaffer v. Carter, 252 U.S. 37 (1920).

[6] See, *e.g.,* VA. CODE ANN. § 58–5 (1959); Flick, *State Tax Liability of Servicemen and Their Dependents,* 21 WASH. & LEE L. REV. 22, 25 (1964).

dictates that an individual, who *neither* is a domiciliary of a state *nor* has been physically present long enough to meet the required statutory time period, must be a nonresident. It should be pointed out that a few states still limit the definition of a resident (for tax purposes) to the inclusion only of domiciliaries. The trend, however, is definitely toward using the broadest permissible tax base, and most states employ the dual test just described.

B. *THE IMPACT OF SECTION 514*

Notice that the operation of these state rules of taxation, if unrestricted by federal legislation, places the soldier at an unfortunate disadvantage. The courts have consistently held that entrance and service upon active duty (which normally involves transferring the soldier to a post outside his home state) does not, standing alone, result in loss of the domicile held by the member prior to his military service.[7] Consequently, without protective legislation, the soldier (although acting in obedience to military orders) would find himself subject to the full taxing power of two states: (1) his state of domicile; and (2) his state of station, assuming he has met the physical presence test.

But the encroachment of section 514 upon the host state's power to tax is both salient and paramount. Under its provisions, the soldier will not be deemed to have lost or gained a residence or domicile solely by reason of absence from his home state in compliance with military orders. From this statutory mandate, a rather obvious principle may be postulated: *Since the service member does not acquire a new residence in the host state merely because of extended physical presence, he must be taxed, if at all, as a nonresident.* Observe, also, that section 514 applies only to the service member—the person moving from state to state in compliance with military orders—and not to the member's dependents.

It has been suggested, you will recall, that a state has the constitutional power to tax a nonresident upon income derived within its boundaries. Why, then, could not the host state argue that mili-

[7] As a matter of fact, the service member desiring to change his domicile often has difficulty meeting the quantum of proof required by the courts. See, *e.g.*, Beasley v. Beasley, 93 N.H. 447, 43 A.2d 154 (1945).

tary pay earned by servicemen stationed within its border* constitutes income derived from services performed within the state? Such an argument would be successful, were it not for the specific provision of section 514 which states that "compensation for military or naval service shall not be deemed income for services performed within, or from sources within" the state of station. Consequently, a taxation of military pay is reserved exclusively to the soldier's state of domicile.

This immunity does not, however, extend to income other than that earned as compensation for military service. As a result, the soldier's tax liability for monies generated by off-duty employment is coextensive with that of any other nonresident. That is, he is liable to the state in which the income was derived. To give an example, suppose Sergeant Jones, a domiciliary of Virginia, is stationed at Fort Benning, Georgia. Assume further that he engages in off-duty employment in the host state. The income derived from that employment is taxable by the state of Georgia. Of course, it is also taxable by Virginia, which can levy a tax upon all of Sergeant Jones' income.

Occasionally, a soldier stationed in one state has off-duty employment in another. To use, again, our hypothetical sergeant stationed in Georgia, consider the tax consequences of his employment (after duty hours) in Phoenix City, Alabama. Here, it is Alabama which has the power to tax this nonresident service member upon income derived within its boundaries. Of course, Virginia again has taxing power, but Georgia is foreclosed because the off-duty income was not derived within its geographical limits. Various other combinations can occur, but even the most vexatious can be resolved, first, by determining in which state the nonmilitary income was derived, and, secondly, by determining what taxes, if any, are imposed by that state upon nonresidents.

We observed earlier that the serviceman's dependents are not within the protective ambit of section 514. Consequently, the soldier's wife soon finds that, for purposes of taxation, she is a

* Congress has declared that living or working on a military reservation does not relieve an individual from the payment of state income taxes to the appropriate authorities. See 4 U.S.C. § 106 (1964). The United States has also consented to state taxation of compensation paid to federal officers or employees. See 53 Stat. 575 (1939), 5 U.S.C. § 84a (1964).

resident of two states: (1) the state in which she is domiciled (normally her husband's home state, acquired through operation of law at the time of marriage); and (2) the state in which she has been physically present long enough to meet the statutory test of residence (normally 6 to 10 months). This unhappy circumstance allows two states to bring their full taxing power to bear upon the wife (or other dependents with taxable income). Although amendments to alleviate these harsh consequences have been proposed, none has passed. Some relief, in the form of credit for taxes paid elsewhere, may be granted by the individual states concerned, but the extent to which such credit is given varies considerably among the states.

III. INTANGIBLES

There are two means of taxing intangibles[9] (such as stocks, bonds, bank deposits, etc.). One is to levy an ad valorem tax upon the intangible itself; the second is to reach the income generated by the intangible by making it subject to the income tax of the taxing state. The former presents the most severe administrative problems, because of the extreme difficulty that collection authorities have ferreting out the kind and amount of intangibles held by the taxpayer, particularly those producing little or no income. As a consequence, a number of states have abandoned the ad valorem or property tax on intangibles. Enough states still retain it, however, to warrant attention to this method of taxation.

The traditional rule is that, for purposes of an ad valorem tax, intangibles have their taxable situs at the owner's domicile.[10] An exception to this rule occurs where the intangibles in question (*e.g.*, notes or accounts receivable) are used in a trade or business. In such a case, the state where the business is carried on may levy a tax upon the intangibles which have gained a situs there because of their business use.[11] It appears that these same intangibles may also be subject to an ad valorem tax imposed by the state of

[9] Occasionally, the line between tangibles and intangibles is hard to draw. The leading case here is Blodgett v. Silberman, 277 U.S. 1 (1928), in which the Court held, *inter alia*, that although a savings bank account is an intangible, paper money (and coin) in a safe deposit box constitutes tangible personal property.

[10] See Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936).

[11] See Curry v. McCanless, 307 U.S. 357, 366-68 (1939).

domicile,[12] if it chooses to utilize its full taxing power.

Without involving section 514, the service member (assuming he does not use his intangibles in a trade or business outside of his home state) normally[13] is subject only to the intangible property tax of his state of domicile. In addition, section 514 insures immunity by specifically providing that neither tangible nor intangible personal property will be deemed to have a situs for taxation in any state where the serviceman is a nonresident. A statutory exception is made, however, for property "used in or arising from a trade or business." If so used, it loses its protected status under section 514 and, of course, becomes taxable by the state in which the trade or business is conducted.

Notice that the operation of the traditional rule—that is, situs for taxation at the owner's domicile—prevents the dependent from double taxation upon intangibles, even though she has no section 514 protection. For example, the wife (who does not use her intangibles in connection with a business) need only meet the requirements of her home state with regard to an ad volorem tax upon intangibles.

Interesting questions arise where the state of station attempts to levy an ad valorem tax upon the wife's intangibles based upon her residence, such residence having been acquired through extended physical presence. Is mere physical presence sufficient nexus for such a tax? Any objection to the tax—assuming it is clear that the host state imposes it—must be founded on the Constitution, and the due process clause appears apposite. Probably no constitutional objection exists; unfortunately, however, the most relevant judicial authority involves the propriety (from a constitutional standpoint) of imposing death taxes.[14] From these cases, however, there clearly emerges a doctrine that multiple taxation does not offend due process. The doctrine establishes, as the test of validity, the requirement that the taxing state

[12] See Newark Fire Ins. Co. v. State Bd. of Tax Appeals, 307 U.S. 313 (1939); Pennsylvania v. Universal Trades, Inc., 392 Pa. 323, 141 A.2d 204 (1958). *Contra*, Standard Oil Co. v. Kentucky, 311 S.W.2d 372 (Ky. 1958) (citing Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936)).

[13] Assuming the state of station levies a tax only upon the intangibles of its domiciliaries, the soldier need not claim his section 514 protection.

[14] See Curry v. McCanless, 307 U.S. 357 (1939); Graves v. Elliott, 307 U.S. 383 (1939).

must furnish protection to, or exercise control over, the persons (or corporations) whose relationships give rise to intangible property rights. Such a test not only implies that the tax of the state of station may be valid, but also raises possibilities of a valid tax by a third state—for example, the state in which a trust is located, or the state in which is domiciled a corporation whose securities are held by the dependent. Increased imposition of the ad valorem tax upon intangibles seems remote, however, since the states probably find other forms of taxation are easier to administer and produce more revenue.

The second way in which a state may reach intangibles is by the imposition of an income tax upon the interest, dividends, or other income generated by the intangibles. Noteworthy is the fact that the validity of such a tax is not dependent upon the right of the taxing state to tax the source for which the income was derived. The Supreme Court has made it clear that a state may tax net income from bonds held in trust and administered in another state, although the taxpayer's equitable interest may not be subjected to the tax.[15]

Considering the plenary power of a state over its residents, it seems clear that their income from intangibles are the proper subject of a tax. Most states, however, restrict the taxation of this income by requiring only their domiciliaries to include it as taxable income. In other words, the traditional rule is that situs for taxation of income from intangibles is the owner's domicile.[16]

The operation of this generally accepted rule protects the serviceman without his having to invoke section 514. He, like the civilian taxpayer, need meet only the demands of his home state. If some state other than his state of domicile attempts to reach this income, he can invoke section 514, which not only gives him the status of a nonresident, but also states that personal property (including intangibles) shall not have a situs for taxation in any state in which the member is a nonresident. The latter provision, it may be argued, is broad enough to include income from such property.

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[15] See New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937). The decision also upholds the validity of a tax upon income derived from the rental of lands located outside the taxing state.

[16] See Suttles v. Illinois Glass Co., 206 Ga. 849, 59 S.E.2d 392 (1950); Hunt v. Eddy, 150 Kan. 1, 90 P.2d 747 (1939); Flick, *supra* note 6, at 29.

The predominant rule for taxing income from intangibles also protects the dependent from multiple taxation. But, suppose a state levies a tax on the income from intangibles of all of its residents, regardless of whether such persons are residents by reason of domicile or physical presence. Such a tax is apparently valid, and its levy subjects the dependent to double taxation—she pays to her state of domicile and to the state where her spouse is stationed. Again, the dependent may be able to avail herself of reciprocal tax credits, but such a credit is only a privilege, the extension of which is discretionary with the state concerned.

However, increased imposition of a tax upon income from intangibles, unless coupled with an equitable system of credits for taxes previously paid, might be the catalyst necessary to persuade Congress to amend section 514 so that dependents, as well as service members, are protected persons. Such a statutory change could be drafted to afford to the dependent, who is actually living with her serviceman-husband, the status of a nonresident in his state of station.[17] The result would be to subject the dependent to income taxes only upon such income as was derived within the state.

IV. REAL PROPERTY

The real property tax is unaffected by section 514. The traditional rule is, of course, that realty is taxable where located.[18] Thus, the rule applies with equal force whether such property is owned by the service member or his dependent, unless the state itself chooses to make an exception.

V. TANGIBLE PERSONAL PROPERTY

It is clear that jurisdiction to impose an ad valorem tax upon tangible personal property depends upon the situs of the property.[19] Situs normally means actual physical presence, although a temporary removal of the property from the taxing state does not

[17] This test is a departure from the statutory test under section 514 which defines the husband's status as nonresident. He is a nonresident of all states except his home state, as long as he is absent from his home state in compliance with military orders.

[18] See First Nat'l Bank v. Maine, 284 U.S. 312 (1932).

[19] See Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932); Hogan v. County of Norfolk, 198 Va. 733, 96 S.E.2d 744 (1957).

defeat that state's jurisdiction.[20] Observe, however, that the relevant inquiry for jurisdictional purposes involves a determination of where the property is situated. The mere residence or domicile of the owner in the taxing state does not, standing alone, afford the state a jurisdictional basis for taxing his tangible personal property. For such tangibles to be properly taxed, they must be with the resident owner or, at least, must not have been permanently removed from the state.[21]

Through a statutory command which ignores the actual fact of physical presence, section 514 affects the location (for tax purposes) of the service member's tangible personal property. It does so by tying the location of that property to the owner's residence, irrespective of where the property may, in fact, be located. Section 514 is clear in its command that personal property will not be deemed to be located in, or have a taxable situs in, any state in which the soldier is a nonresident. Thus, through a legal fiction, the member's tangible personal property never does acquire a situs in his state of station. It is also clear that the property remains immune even if the soldier leaves it in his state of station (or former state of station) in order to perform duty elsewhere.[22] As long as the member is not a resident of the state in which his tangible personal property is located, that state cannot tax his property. Of course, under section 514, he does not acquire a new "tax residence" or lose the "tax residence" in his home state, solely by reason of absence from his home state in compliance with military orders. It should be noted, however, that he may establish enough contacts with the host state through voting, the payment of income taxes, etc., to effect a change of domicile, but this seldom occurs unless the member is trying to effect a change.

The net effect of section 514 is to provide the soldier with immunity from a tangible personal property tax levy in his host state, or in any other state where he is a nonresident. And, the

[20] See Brook & Co. v. Bd. of Supervisors, 8 Cal. 2d 286, 65 P.2d 791 (1937).

[21] See Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932); Hogan v. County of Norfolk, 198 Va. 733, 96 S.E.2d 744 (1957).

[22] This blanket immunity was made explicit in a recent amendment to section 514 (see 76 Stat. 768 (1962)), although an appellate court had held that this broad protection existed on the basis of the language of the section prior to the amendment. See United States v. Arlington County, 326 F.2d 929 (4th Cir. 1964).

Supreme Court in *Dameron v. Brodhead*[23] held that this immunity adheres, even though the member has not paid a tax upon his property in his home state.

A question which merits brief exploration is whether the soldier's home state has the power to tax the tangible personal property which accompanies the absent member. The problem is, of course, that the property is physically outside the state of domicile, and, as indicated earlier, domicile is not a proper jurisdictional basis for the imposition of a tangible personal property tax. Nevertheless, it appears that such a tax is valid. There are two reasons which support this conclusion. First, the Supreme Court has suggested (although not held) that such a tax could be sustained.[24] Secondly, in those cases in which the Supreme Court has applied the rule that jurisdiction to tax tangibles is founded upon presence within the taxing state, the denial of taxing power has implicitly rested not only upon the fact that the property is located outside state lines, but also upon the fact that it has gained a taxable situs in the state in which it is present.[25] However, because of section 514, the soldier's property does not gain a taxable situs in his host state (or in any other state in which he is a nonresident). Consequently, if the property has a taxable situs anywhere, it has such a situs in the soldier's home state.

The theoretical justification for an ad valorem tax by the state of domicile does not mean that in most cases such a tax should be paid. Inquiry must first be made whether the home state chooses to tax the soldier's property which is physically outside the state. Here, a search of the code of the soldier's home state is in order; but, without the additional reference to opinions of the state attorney general interpreting the relevant section(s), one can easily be misled. For example, the Code of Virginia imposes a tangilbe personal property tax only upon such property

[23] 345 U.S. 322 (1953).

[24] See Dameron v. Brodhead, 345 U.S. 322, 326 (1953).

[25] See Standard Oil Co. V. Peck, 342 U.S. 382 (1952); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905). Although these cases involve the taxation (by a principle of apportionment) of tangibles moving in interstate commerce, it is nevertheless reasonable to conclude that, in theory at least, a state in which property has been permanently located does not lose its right to tax until such time as the property acquires a taxable situs in another state.

as is "physically located" within the state;[26] yet, the attorney general has ruled that this does not mean actual physical presence, but means situs in the legal sense.[27] He reasoned that the effect of section 514 is to retain the situs of the serviceman's personal property in his home state. Hence, the absent Virginia soldier may be required to meet the Virginia personal property tax.

It might be reiterated that the Virginia interpretation, even if somewhat unusual, may indeed have a sound basis in legal theory; but the point is that such a tax is almost impossible to administer effectively. Indeed, the administration of a tangible personal property tax upon properties actually within the state is riddled with difficulties. The levy of an ad valorem tax upon tangibles generally involves an appraisal of the property by tax authorities, and this usually is not feasible with regard to items located beyond state lines. The problem of incomplete disclosure by the taxpayer—which, unfortunately, exists even when all of his property is within the state—is surely compounded when the property is located in another state. In short, the difficulties which account for the present decline of the ad valorem tax upon tangible personal property are only accentuated when the property accompanies an absent soldier. It is for this reason that efforts to tax an absent serviceman are likely to be minimal.

The situation with regard to the taxation of a dependent's tangible personal property is, of course, quite different from that of the service member. Since the dependent is afforded no protection under section 514, her tangible property can, and usually does, gain a taxable situs in the host state. However, when the dependent's property acquires a taxable situs in the state of station, it should lose its taxable situs in the home state.[28]

As a general practice, host states, in which a dependent is living with her serviceman-spouse, do levy an ad valorem tax upon the dependent's separate property. Where the property is jointly owned by, say, a soldier and his wife, some states tax one half

[26] See VA. CODE ANN. § 58-834 (1959).

[27] Letter From Attorney General of Virginia to Honorable A. Burke Hertz, 15 September 1965.

[28] This certainly should be the result, since the property not only is outside the state of domicile but also has gained a taxable situs in the host state. See Dameron v. Brodhead, 345 U.S. 322 (1953); Standard Oil Co. v. Peck, 342 U.S. 382 (1952); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).

the total value of the jointly held tangibles on the theory that, since half of the property is owned by the wife, her half has gained a taxable situs in the state of station. This levy has not yet been judicially tested, and there is serious doubt whether Congress intended joint ownership to partially defeat section 514 immunity.

One exception to the taxation of the dependent's property by the host state occurs where the property is located on a military reservation subject to exclusive federal jurisdiction. The leading case in this area—*Surplus Trading Co. v. Cook*[29]—makes it clear that, where the federal government has exclusive legislative jurisdiction over a reservation, the state is without power to levy an ad valorem tax upon property located on it. In some instances, however, where federal jurisdiction is less than exclusive, the state has reserved the power to tax privately owned tangibles located on a military reservation, and thus, is in a position to tax a dependent's tangible property.

At this point, attention should be given two provisos in section 514, one of which was mentioned in connection with the taxation of intangibles. It will be recalled that section 514 immunity does not extend to intangibles used in a trade or business. The same is true of tangibles. Thus, to give an example, where the member utilizes his personal property in an off-duty trade or business, the property so used loses its section 514 immunity and becomes taxable by the state where it is employed for a business purpose.

A second proviso in section 514 makes it clear that the nonresident member acquires immunity from "licenses, fees, or excises imposed in respect to motor vehicles or the use thereof," only if he has met the license, fee, or excise requirements of his home state. Observe that this provision does not affect the rules for levying a tangible personal property tax, which have already been discussed. However, it does place license, fee, and excise taxes, imposed with respect to motor vehicles, in a special classification so that, if the requirements of the home state are not met, the host state may impose its own "licenses, fees, or excises." Consequently, it is apparent that from a taxing standpoint it is advantageous for the state of station to classify as many taxes as it can as license, fee or excise levies. This will allow the host state

[29] 281 U.S. 647 (1930).

to present the service member, who fails to meet the requirements of his state of domicile, with a sizeable tax bill, properly labeled, of course, as a "license fee" or similar designation.

But, what characteristics must a tax have before it may properly be labeled a license, fee, or excise? This was the basic question in the recent case of *California v. Buzard*,[30] where the facts were these: Captain Buzard, a domiciliary of the state of Washington, was stationed at an Air Force base in California. While performing temporary duty in Alabama, he purchased a new automobile, which he registered in that state, obtaining Alabama license plates. Shortly after his return to California, he was advised by California officials that he should register his car in California and pay the attendant fees, as he had failed to register the vehicle in his home state of Washington. Upon going to the proper office to fill out the necessary titling papers and to purchase his license tags, the soldier discovered that California's license fee consisted of two parts: a basic registration charge of $8, and a second charge—called a "license fee"—which was calculated by taking 2 percent of the market value of his car. Since this second charge amounted to almost $100, Captain Buzard refused to pay it. He was, however, willing to pay the $8 basic registration fee.

When prosecuted for failure to register his car (and upon appeal of his conviction), the defending officer advanced a rather ingenious argument. He pointed out, first of all, that section 514 allows the host state to impose a "license, fee or excise" only where a similar charge "required by" the home state has not been paid. He then showed that his home state of Washington placed a registration and license requirement *only* upon persons who, during the registration year, drive upon the highways of that state. Thus, the defendant's argument went, in effect, "Since I have not driven upon the highways of my home state during the current registration year, no license fee or excise is owed to that state." Consequently, he asserted that, since no fee is required by the state of domicile, the proviso in subsection (2) of section 514 had no application. In other words, the defendant contended that he had done all that was required by his home state, namely, nothing.

The Supreme Court of the United States rejected the de-

[30] 382 U.S. 386 (1966).

fendant's construction of the section, although it sustained the vacation of his conviction. (The California Supreme Court had vacated the conviction on the basis of the defendant's contentions concerning the section 514 proviso.) Despite the defendant's winsome argument, the Supreme Court ruled that, in order for the nonresident soldier to be immune from bona fide license fees imposed by the host state, he must have actually paid a similar fee to his state of domicile.[31] However, Justice Brennan, speaking for a unanimous court, said there was a reason why the defendant's conviction must be vacated. The reason for the invalidity of the conviction, the Court held, was that the "license fee" calculated by taking 2 percent of a car's value is not a license, fee or excise subject to the proviso in section 514; rather it is a revenue-raising measure from which the defendant is completely imune. In the Court's view, it is immaterial what label the state wished to give the tax; it must be decided, as a matter of federal law, what taxes may properly be classed under section 514 as a license, fee or excise. It is significant that Justice Brennan refused to read into section 514 a congressional intent that the service member should be required to contribute to the costs of highway maintenance in his state of station. Consequently, it was concluded that the phrase "licenses, fees and excises," as used in section 514, refers only to charges essential to the functioning of the host state's licensing and registration laws. The 2 percent levy did not, of course, qualify as such a fee. The question of whether the basic $8 registration fee qualifies as a "license fee or excise" was left open for future determination by the state courts of California.[32] It seems a fair observation to state that, in order for a charge to be classified as one subject to section 514's proviso, it must bear a reasonable relation to the cost of licensing the car.

The *Buzard* decision has significant implications, not the least of which is its effect upon "license fees" charged by political sub-

[31] In other words, the phrase "license, fee, or excise *required by* the state" was read as meaning "license, fee, or excise *of* the state."

[32] See California v. Buzard, 382 U.S. 386, 396 n.ll (1966). The characterization of a unit (as opposed to a severable) fee as a revenue-raising levy poses interesting problems. Would the host state then be required to have a special, reduced license fee applicable to nonresident servicemen who had failed to register in their home state?

divisions—cities and counties. Prior to the *Buzard* case, it was common practice for a particular city or county in which a nonresident soldier was residing to cause him (if he elected to register his car in the host state) to acquire a *local* license plate or sticker.[33] The cost of this plate or sticker varied from place to place, but a charge of $10 was not unusual. This charge was justified by the assertion that this levy was a license, fee, or excise from which the soldier was not immune because, since he failed to register his vehicle in his home state, he had not paid a similar charge there. The Virginia Supreme Court used this rationale in the *Whiting* case[34] to validate the imposition by the city of a "license fee" to $10 upon a nonresident soldier (who had purchased Virginia state license tags) residing there in compliance with military orders.

But, the point is that a local "license fee" is, generally, the kind of revenue-raising measure condemned in *Buzard v. California.* As a matter of fact, Justice Brennan, in a footnote, cited the *Whiting* case with disapproval.[35] This citation, when viewed in the light of the "nonrevenue test" enunciated by the Supreme Court, caused the Virginia attorney general to rule that a local "license fee" levied upon a nonresident service member is no longer supportable.[36] Other states have followed suit, since it is apparent that most local motor vehicle fees are imposed primarily to produce revenue. Typically, the tax proceeds are channeled into street maintenance or other public services performed by the taxing authority. In fact, the character of the levy may generally be determined by searching the relevant tax code and ascertaining the disposition made of the proceeds. Only if the sum collected is essential to the functioning of a political subdivision's licensing and registration laws, can the test used in *Buzard* be met.[37]

[33] See, *e.g.*, Whiting v. City of Portsmouth, 202 Va. 609, 118 S.E.2d 505 (1961); *but cf.* Woodroffe v. Village of Park Forest, 107 F. Supp. 906 (N.D. Ill. 1952).

[34] Whiting v. City of Portsmouth, *supra* note 33.

[35] See California v. Buzard, 382 U.S. 386, 393 n.7 (1966).

[36] Letter From Attorney General of Virginia to Honorable Joseph E. Spruill, Jr., 14 April 1966.

[37] Suppose a soldier from City *A* of State *A* were stationed in City *B* of State *B*. He buys a state license tag from State *A* (his home state), but does not purchase a local license tag from City *A* (his home city). City *B* then attempts to impose a valid license fee (one other than a revenue measure) upon the soldier's car on the ground that he has not met the fee required by

Notice, however, that *Buzard* deals with the exaction of a fee and not with the right of a properly constituted authority to cause a soldier to comply with valid traffic regulation. Thus, if a local license tag or sticker has a valid regulatory purpose, the soldier may be caused to install it on his vehicle, notwithstanding the fact that he would not have to pay an attendant fee imposed for revenue purposes.

VI. A FOOTNOTE ABOUT POLITICAL SUBDIVISIONS

A final point should be made concerning the application of section 514. Frequently overlooked is the fact that the section may affect the imposition of taxes even where a member is stationed in his home state. This is so because Congress specifically provided that the member would not lose residence or domicile in the political subdivision which is his home, solely because of his absence therefrom in compliance with military orders.[38] In other words, the soldier stationed in a city or county different from his city or county of permanent residence, retains (for purposes of taxation) his residence and domicile in the political subdivision from which he is absent in compliance with orders. This status of a nonresidency in the political subdivision where stationed carries with it protection from taxes which may be imposed by that city or county upon residents. It also prevents his personal property from acquiring a taxable situs in the political subdivision where he is stationed or, indeed, in any city or county except that in which he has his permanent home (domicile).

VII. PROBLEM AREAS: THEORETICAL AND PRACTICAL

Recall that the nonapplicability to dependents of section 514 has caused some jurisdiction to tax one half of jointly owned personal property. The justification for this levy lies in the fact that, since the wife is unprotected, her interest in personal property is said to have a taxable situs where located—unusually the state of sta-

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City *A* (his home city). Notice that section 514 immunity is given to the nonresident member who meets the license, fee, or excise "required by the state" in which he is a permanent resident. Nothing is said about meeting motor vehicle fees levied by the political subdivision in which he is a permanent resident.

[38] "[S]uch person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or any political subdivision of any of the foregoing. . . ." 56 Stat. 777 (1942), as amended, 50 U.S.C. App. § 574 (1964).

tion. But, suppose a soldier comes from (is domiciled in) a community property state. Could it not be argued that this subjects all property purchased with community funds (which is most of that acquired since marriage, other than gift or inheritance) to an ad valorem tax on the wife's one-half interest? And, using a similar rationale, why not argue that the salary received by the husband (which is generally considered community property) is taxable to the extent of the wife's one-half interest in it? (This assumes, of course, that the wife's income is taxable because she has become a resident in the host state through physical presence.)

Perhaps these questions can best be discussed in inverse order. First, with regard to the husband's military income, there is substantial evidence in the legislative history of section 514 to support the conclusion that military pay is a separate and unique classification, the taxation of which is the exclusive right of the state of domicile.[39] Based upon a reading of this legislative record, a court might very well deny the host state taxing power over the wife's community interest in the husband's military salary. A second means of defeating such power would be by having the wife and husband enter into an agreement, whereby she undertakes to have her interest in his salary transferred to him. This kind of arrangement, which would be recognized in community property states, would insure that the husband's military salary would be treated as entirely his own, with a resulting 100 percent exemption under section 514. Under applicable conflict of laws principles, of course, the taxing state should determine the nature and extent of ownership by looking to the laws of the state of domicile.[40]

This device for transferring ownership could also be used to defeat a tangible personal property tax. The wife could simply agree to transfer her interest in community personal property to her husband—an agreement which should be recognized as valid by the host state. One must be cautioned, however, that an agree-

[39] See H.R. Rep. No. 1514, 78th Cong., 2d Sess. 1–2 (1944); S. Rep. No. 959, 78th Cong., 2d Sess. 1–2 (1944); Flick, *State Tax Liability of Servicemen and Their Dependents*, 21 WASH. & LEE L. REV. 22, 28 (1964). As Mr. Flick observes, dictum in Dameron v. Brodhead, 345 U.S. 322, 326 (1952), reinforces this conclusion.

[40] See, *e.g.*, Vining v. Smith, 213 Miss. 850, 58 So.2d 34 (1952); 1 DE FUNEAH, PRINCIPLES OF COMMUNITY PROPERTY 252 (1943).

ment for the transfer of either income or property should be executed only after a careful consideration of its possible effect upon such matters as gift and estate taxes and division of property in the event of divorce. Finally, it seems appropriate to add that, since the author knows of no state of station that has advanced the community property argument described above, the questions raised and discussed remain more academic than practical.

A problem of more practical significance is posed by the taxation of house trailers. Initially, the question of the proper classification of such mobile homes must be resolved. Most states take the position that house trailers are motor vehicles, hence licenses, fees and excises must be met in the home state in order to insure immunity from a similar tax by the host state. But it should be emphasized that the failure to meet such fees in the state of domicile does not render the soldier liable for an ad valorem tax on the trailer.[41] And, it is also clear that under the *Buzard* decision a host state may not disguise a revenue-raising tax as a license, fee, or excise tax and impose it upon the trailer of a nonresident serviceman who has not registered his car in his home state.

Of course, an argument can be made that, where the wheels of a mobile home are removed and water, sewage and electricity connections are made, the trailer becomes real property. As noted earlier, section 514 has no effect upon the taxation of real property; so, assuming the state's classification is a reasonable one, a real property tax may be imposed. But, a federal court could, as in *Buzard*, disregard the state label and declare that Congress intended that trailers be immune as personal property.

The proper analysis of any house trailer tax must turn, first, upon the question of the proper classification of the taxed property and, secondly, upon the proper classification of the tax in question. It should be borne in mind that as personal property, the trailer has no situs in the state of station under section 514 for the imposition of ad valorem taxes and, except for treating the trailer as real property, there does not appear to be any other nexus for the imposition of a revenue-raising tax. To the author's knowledge, flat per-month fees (ranging from $2 to $10) imposed by some states and localities upon occupants of mobile homes,

[41] This was made clear in Snapp v. Neal, 382 U.S. 397 (1966), a companion case to California v. Buzard, 382 U.S. 386 (1966).

including nonresident servicemen, have not yet been judicially tested. These charges have various labels, and there is serious doubt as to their validity under section 514.[42]

Another problem of practical significance is the effect, if any, of section 514 upon sales and use taxes. Again the proper approach is, first, to determine the nature of these taxes. In the case of the sales tax, the levy is upon service and property transactions (sales) that may be said to have their situs in the taxing state. Since it is the sale transaction (or at least the privilege of selling at retail) which is the subject of the tax, usually neither the residence of the buyer nor the permanent situs of item purchased is a relevant consideration. The nonresident tourist traveling through New York pays a sales tax upon his purchases there; so does the nonresident serviceman stationed in New York who purchases goods in New York stores. In short, section 514 does not offer immunity from the imposition of a state sales tax,[43] because the tax itself depends upon a legal basis upon which the section has no effect.

But, generally, states which have a sales tax have enacted a companion use tax as a complementary measure. This kind of tax is imposed upon the use or other consumption of property within the taxing jurisdiction, when the user has not paid a sales tax either in that jurisdiction or elsewhere. The idea, of course, is to protect dealers in the taxing state who must collect and pay a sales tax, by placing them on a basis of tax equality with competing out-of-state vendors who are not subject to a sales tax. A second reason for the use tax is to minimize tax avoidance by the consumers themselves.

The courts have uniformly held that the use tax is an excise rather than a property tax.[44] It is a levy upon the privilege of use

[42] Some of these levies might be justified as an excise tax upon the privilege of renting space within a trailer park which is located within the taxing state's boundaries. However, where the statutory authority for the tax or its administration makes it clear that this is not its character, the taxing authorities will be hard pressed to offer a plausible basis for its imposition.

[43] Therefore, a soldier stationed in a state which imposes a sales tax upon the purchase of new automobiles, must meet such a tax if he buys a car in his state of station. However, if the tax is properly classed as a titling tax (as opposed to a sales tax) which must be paid as a condition of registration, then *California v. Buzard* has application. See note 45, *infra*.

[44] See Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937); see generally

within the taxing boundaries. Therefore, even conceding that the use tax is not a property tax (which could be the subject of a lively academic argument), the proposition remains that the property must be located in the taxing jurisdiction before it can be "used" there for tax purposes. This raises an interesting question, when it is recalled that section 514 states in rather bold language that "personal property shall not be deemed to be located or present in or to have a situs for taxation in" any state or political subdivision in which the soldier is a nonresident. The section goes on to provide that it applies to "personal property, *or the use thereof*, within any tax jurisdiction other than [that of the serviceman's home] . . . regardless of where the serviceman . . . may be serving in compliance with [military] . . . orders." (Emphasis supplied.) Using the provisions as a basis for argument, a sound contention can be made that a state of station cannot collect a use tax from a serviceman who purchases an item (usually in another jurisdiction) upon which no sales tax has been paid. The fact that the use tax is designed to "put teeth" in the administration of a sales tax (which *is payable* by the service member) should not be determinative, when it is recognized that, although the two taxes are complementary, they rest upon different theoretical foundations.[45]

A final comment should be addressed to the question whether a state of station may cause a nonresident soldier to obtain an operator's license (or permit), where he holds a valid permit from his state of domicile. To the extent that a requirement for obtaining such a license depends upon residence, it might be argued that

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Greener, *The Use Tax: Its Relationship to The Sales Tax*, 9 VAND. L. REV. 349 (1956).

[45] It is also interesting to speculate what effect the *Buzard* decision has upon the collection of a use tax when a state makes the payment of such a tax (or a sales tax) a precondition to registering a vehicle. To give a concrete example, assume State *X* has a sales and use tax. The soldier in question, who is stationed in *X*, purchases his automobile in nearby State *Z* which has no such taxing scheme. Upon registering his automobile in State *X*, he discovers that a condition to registration is the payment either of a sales tax or of *X*'s use tax. Putting aside the argument that the property cannot be "used" in State *X* because it is not "located" there under section 514, does not *Buzard* forbid the imposition of this use tax? Would not it be fair to characterize the tax as an "excise imposed in respect to motor vehicles or the use thereof" which is not essential to the functioning of *X*'s licensing and registration laws?

the soldier, as a nonresident, is exempt. The answer which could be given by the host state is that section 514 was never intended to intrude upon the states' police power and that a requirement that a soldier meet the driving test of the state of station is one exercise of that power.

The solution which, in the author's opinion, is most likely to prevail represents an adjustment of these two conflicting contentions. It can be convincingly argued that the fee charged for an operator's license is a license, fee, or excise "imposed in respect to motor vehicles or the use thereof" within the meaning of section 514. This means that, in terms of its purpose and amount, the fee must meet the test set forth in *Buzard* and cannot, therefore, be a revenue measure. It also means that, when a fee has been paid to the soldier's home state (as in the case where he holds a valid operator's license issued by his state of domicile), he is immune from the fee imposed by his state of station. But this immunity only protects the service member from the exaction of a fee; it in no way restricts the host state's power to subject him to a driving examination, provided this examination is not attended by a fee.[46] Of course, where the member is without a valid operator's permit from his home state, he must not only meet the driving requirements of the host state, but must also pay any attendant fee which is necessary to the functioning of that state's licensing laws.

VIII. CONCLUSION

Section 514 has, since 1942, represented the judgment of Congress as to the extent to which a state may exercise taxing power over a serviceman stationed within its territorial limits. A reexamination of this section might be desirable, since the statute itself is deficient in part, and timely, since the Universal Military Training and Service Act will be considered for renewal in 1967.[47] Relevant factors bearing upon a statutory modification include the increased reliance by states upon sales and use taxes; the hardships accruing to dependents as a result of their complete omission from the present statute; and, finally, whether the section effects a desirable adjustment between state and soldier in the case of a

[46] For an enlightening pre-*Buzard* opinion on the subject of taxes and operator's licenses, see JAGA 1953/7267, 3 Sept. 1953, 3 Dig. Ops. JAG, SSCRA, § 45.11.

[47] 62 Stat. 625 (1948), as amended, 50 U.S.C. App. § 467(c) (1964).

career serviceman. Whatever the operative statute—and there is every reason to believe that protective legislation in some form will continue—uniformity of interpretation is certainly essential to its proper administration. It is toward that end that this comment has been offered.

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THE SELECTIVE SERVICE SYSTEM IN 1966.* During the year 1966, the Selective Service System has been the source of intensive activity. Beginning in 1964, increasing in 1965, and perhaps coming to a peak point in 1966, the System has proved to be a subject of extensive public discussion both favorable and unfavorable. Calls for men via the System have increased. Medical personnel and allied specialists have been inducted in increasing numbers, married men are being selected in some local board areas, and students are being examined as to scholastic standing with regard to curtailment of deferment. Proposals have been advanced and studies are being made with a view to possible overhauling or amendment of the System in 1967. The present statute, which is the Universal Military Training and Service Act,[1] will require congressional extension beyond 1 July 1967.[2] A Department of Defense Report on the Selective Service System was released on 30 June 1966.[3] President Lyndon B. Johnson on 2 July 1966 announced the appointment of a 20-member National Advisory Commission to review all aspects of the Selective Service System.[4] The House Armed Forces Committee has held public hearings in the matter of alleged complaints as to the workings of the System.[5] All of this has aroused a public interest and concern in the pros and cons of Selective Service.

This study will seek to update several prior articles in this publication by this writer dealing with the general subject of Selective Service.[6]

I. CLASSIFICATIONS AND NUMERICAL STRENGTH

The following Classification Picture shows the total number of registrants in each Selective Service classification on a nation-wide

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*The opinions and conclusions presented are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] See 62 Stat. 604 (1948), as amended, 50 U.S.C. App. § 451 (1964) [hereafter cited as the Act].

[2] See 77 Stat. 4 (1963), 50 U.S.C. App. § 467(c) (1964). A 4-year extension was voted by Congress beginning 1 July 1963.

[3] See Sacramento Union, 1 July 1966, p. 1.

[4] Washington Post, 3 July 1966, p. A1.

[5] Selective Service, vol. 16, No. 7, July 1966, pp. 2–4.

[6] See Shaw, *Selective Service: A Source of Military Manpower*, 13 MIL. L. REV. 35 (1961); *Selective Service Litigation Since 1960*, 23 MIL. L. REV. 101 (1964); *Selective Service Ramifications in 1964*, 29 MIL. L. REV. 123 (1965); *Selective Service in 1965*, 33 MIL. L. REV. 115 (1966).

basis and discloses the various manpower classifications within the Selective Service System as of 1 July 1966.[7]

Classification Picture July 1, 1966

Total	32,638,304
I-A and I-A-O	1,112,013
Single or married after August 26, 1965	
Examined and qualified	69,768
Not examined	70,509
Induction or examination postponed	8,831
Ordered for induction or examination	178,429
Pending reclassification	95,734
Personal appearance and appeals in process	14,468
Delinquents	12,661
Married on or before August 26, 1965	
Examined and qualified	101,152
Not examined	16,860
Induction or examination postponed	857
Ordered for induction or examination	11,783
Pending reclassification	13,713
Personal appearances and appeals in process	2,198
Delinquents	970
26 years and older with liability extended	68,569
Under 19 years of age	445,512
I-Y Qualified only in an emergency	2,353,779
I-C (Inducted)	421,634
I-C (Enlisted or commissioned)	1,880,054
I-O Not examined	4,178
I-O Examined and qualified	3,133
I-O Married, 19 to 26 years of age	1,720
I-W (At work)	4,378
I-W (Released)	5,995
I-D Members of reserve component	1,207,347
I-S Statutory (College)	19,347
I-S Statutory (High School)	492,394
II-A Occupational deferment (except agricultural)	205,112
II-A Apprentice	28,114
II-C Agricultural deferment	21,947
II S Occupational deferment (student)	1,782,416
III-A Dependency deferment	3,580,555
IV-A Completed Service; sole surviving son	2,427,476
IV-B Officials	58
IV-C Aliens	12,337
IV-D Ministers, divinity students	95,911
IV-F Not qualfied	2,500,368
V-A Over age liability	14,197,300

[7] Selective Service, vol. 16, No. 8, Aug. 1966, p. 4.

There has been noted in 1966 the impact of Executive Order No. 11241,[8] effective 26 August 1965, whereby President Johnson in effect removed the deferment previously allowed to married men without children. Before 26 August, married registrants were in a delayed sequence of induction since 10 September 1963 when President John F. Kennedy had deferred married registrants.[9] The result of Executive Order No. 11241 has been to increase the available pool of I-A's to meet increasing calls for men made by the Department of Defense for the Armed Forces in 1965 and 1966.

There are no restrictions imposed by the Director of Selective Service [10] upon the release by local boards of lists of names of registrants. In the absence of any restrictions which may be imposed by a State Director of Selective Service upon the local boards within his state, the local boards may publish lists of registrants.[11]

A review of Class I-Y registrants has been stressed during 1966 in order to redetermine the acceptability of I-Y registrants who would have been I-A except for a failure to score 80 in the Armed Forces Qualification Test.[12] Such registrants are often high school graduates, and the net result is an increase of available I-A's as this group of I-Y's has been forwarded to Armed Forces Examining Stations (AFES).

During the year, Class IV-F registrants have been screened at AFES so that they might be counseled and encouraged to utilize medical or vocational rehabilitation services available in their home comunities.[13] In 1965, 319,000 young registrants were rejected at AFES for medical seasons. Now, the rejectees are encouraged to seek to overcome their impairments by early contact with the Public Health Service and the Vocational Rehabilitation Administration which are federal agencies. In addition, any available state facilities are utilized.

The average age of induction has been lowered during the past

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[8] 30 Fed. Reg. 11129 (1965).
[9] See Exec. Order No. 11119, 28 Fed. Reg. 9865 (1963), as amended.
[10] The Director is Lieutenant General Lewis B. Hershey, who holds office at the pleasure of the President.
[11] Sel. Serv. System, Nat'l Hq., Local Board Memorandum No. 71, as amended, 15 April 1966 (issued to all local boards).
[12] See Sel. Serv. System, Nat'l Hq., Operations Bull. No. 286 (28 Dec. 1965).
[13] See Selective Service, vol. 16, No. 5, May 1966, p. 3.

year. In May 1955, the average age of involuntary induction was 23 years and 7 months. In May 1965, the average age of induction had dropped to 21 years and 2 months. In October 1963, 22 years and 8 months was the average.[14] The increasingly heavy calls for men after mid-1966 have caused the average age to approach 20 years.

II. INCREASED CALLS: VIETNAM

The following table[15] shows the calls from the Department of Defense to the Selective Service System for the first 10 months of 1966.

January	38,000
February	29,000
March	22,000
April	22,000
May	34,000
June	18,500
July	28,500
August	36,600
September	37,300
October	46,200
Total through ten months	312,700

The following data,[16] by way of comparison, show Selective Service calls, deliveries and inductions for the *fiscal year* since 1956:

Fiscal Year	*Calls*	*Deliveries*	*Inductions*
1956	136,000	149,474	136,580
1957	175,000	196,875	179,321
1958	124,958	144,026	126,369
1959	109,000	137,745	111,889
1960	89,500	130,119	90,549
1961	58,000	85,274	61,070
1962	147,500	194,937	157,465
1963	70,000	98,971	71,744
1964	145,000	190,496	150,808
1965	101,300	137,590	103,328

[14] *Id.* at 4.

[15] Data extracted from volume 16 of *Selective Service* covering each month. It should be understood that the men *delivered* to AFES in any month will exceed the number of men specified in the call, as it is foreseeable that rejections will result at AFES. For example, for the fiscal year 1964, the calls were for 145,000 men; 190,000 registrants were delivered, and 150,000 were inducted. See 1965 DIR OF SEL. SERV. ANN. REP. 26[hereafter cited as 1965 REPORT].

[16] 1965 REPORT 26.

The local board of the Selective Service System delivers men in a two-fold sense. There is a delivery of a registrant for purposes of a preinduction *physical examination*, and, if he is passed physically and is otherwise qualified and classed I-A, he is delivered ultimately for *induction*. For example, the local boards from July to November 1965, delivered 700,000 men for physical examination generally at AFES.[17] The rejection rate among those examined in November 1965 was 39 per cent.

There is a direct consequence of the enlistment of men into the Regular Armed Forces and their reserve components, because of the previous impact of Selective Service upon those same men as registrants under the Act. Thus, in November 1965, the enlistments into active and reserve forces from registrants previously qualified for military service totaled 37,704. The active forces received 16,627 from local board sources, the National Guard 7,295, and other reserve components gained 13,782. The Army took 5,296, the Navy 4,351, the Air Force 5,462, the Marine Corps 1,332, and the Coast Guard 186. Among the reserve elements, after the National Guard, the Navy Reserve gained 6,461, the Army Reserve 4,218, the Marine Corps Reserve 1,853, and the Coast Guard Reserve 115. This was not a phenomenon for just one month. In October 1965, the armed forces acquired 36,242 physically acceptable registrants. In September, there were 26,836.[18] The significant feature is that month after month, the active and reserve forces find a most receptive source of men among the Selective Service registrants who have passed their physical examinations, are classed I-A, and are awaiting induction into the Army via Selective Service. Between 1 September 1965 and 31 January 1966, 380,000 men entered the Armed Forces, regular and reserve, including the Army and Air National Guard. Of this number, 170,000 were inducted from Selective Service. 180,000 were enlisted from the examined and accepted pool of waiting registrants. Only 30,000 or 1/12th came from outside the Selective Service pool of registrants.[19] The *force majeure* propelling 350,000 men into the Armed Services in a 4-month period was Selective Service!

Even if the registrant waits until he receives written orders

[17] Selective Service, vol. 16, No. 2, Feb. 1966, p. 1.
[18] *Id.* at 2.
[19] Selective Service, vol. 16, No. 3, March 1966, p. 1.

from his local board to report for induction on a date certain, he may still be enlisted into the Armed Forces. If one of the Regular services will receive him, he may request his State Director of Selective Service to cancel his order to report at AFES. Normally, the order is then cancelled and he is enlisted.[20]

The likelihood of increasingly large calls for men through Selective Service is evident. The October 1966 call was for 46,200 men. This was with regard to a total strength of the Armed Forces of 3,093,356 on 1 July 1966.[21] The October 1966 call was the highest through Selective Service since the 53,000 called in May 1953 near the end of the Korea conflict. There are unofficial estimates that the forces in Vietnam will approach 400,000 by the beginning of 1967, and perhaps reach 500,000 at some point in 1967.[22] In that Selective Service is fully utilized by the Army, a marked increase in strength by the Army points to larger Selective Service calls.

On 18 August 1966, the Senate in approving the budget bill added a provision to authorize the President to call up individual members of the Ready Reserve for service in Vietnam.[23] This authority had not been requested by the White House.

III. LITIGATION IN 1966

Considerable litigation has arisen during the calendar year and mainly involving conscientious objectors (I-O) or ministerial (IV-D).

A. *WHO IS A MINISTER?*

In *United States v. Petiach*[24] a conviction was affirmed for failure to report for civilian work in lieu of induction. The defendant had claimed that he was ordained as a minister at the age of 14 years when he was baptized. He had requested a hearing before the local board. After the board scheduled a hearing, the defendant informed the board he could not attend.

The Seventh Circuit held that the board classification of the defendant as a conscientious objector had a basis in fact and was

[20] Sel. Serv. System, Nat'l Hq., Operations Bull. No. 287 (20 Jan. 1966).
[21] New York Times, 27 July 1966, p. C23.
[22] New York Times, 17 July 1966, p. E3.
[23] San Francisco Chronicle, 19 Aug. 1966, p. 1.
[24] 357 F.2d 171 (7th Cir. 1966).

not arbitrary and capricious and the local board properly denied a claim for ministerial exemption (IV-D) and granted that of conscientious objector (I-O). Congress did not intend that a ministerial status would apply to *all* baptized members of any congregation of Jehovah's Witnesses. The scope of judicial review is limited in this type of case. The court cited *Dickinson v. United States*,[25] and quoted with approval:

> The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act[26] "is a narrow one intended for the leaders of the various religious faiths and not for the members generally."

In *Petiach*, the court also cited *United States v. Norris*,[27] where a defendant claimed that he became a minister at age 14 years when he was baptized, and the court ruled that under the facts classification of the registrant is still for the local board to decide.

United States v. Kenstler[28] was a prosecution of an objector for failing to report for civilian work. The defendant was classed I-O after he stated before the local board that he devoted 15–20 hours weekly "working on cars" as a repairman. The defendant claimed that he gave 100 hours a month to ministerial work. The defendant was called an "Accounts Servant" by his congregation of Jehovah's Witnesses. On his questionnaire form, the defendant checked the box "widower" although there was reason to believe that he had never been married. He was refused a ministerial exemption (IV-D).

The court held that the record disclosed that the defendant was an auto mechanic and not a full time minister (IV-D). No person is entitled to a ministerial exemption unless engaged regularly, as a vocation, in preaching and teaching. It is not material that the Watchtower Bible and Tract Society asserts that a full time minister is one who devotes 100 hours monthly to church work. The court opined that *at lease 160 hours a month* should be devoted to the ministry. Further, in the Watchtower Society, ministerial exemption is not claimed by anyone below the rank of "pioneer." The defendant has never held such a rank or position, and is only equivalent to a treasurer in his congregation.

The result in *Kenstler* is that the court has rejected a ratio of

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[25] 346 U.S. 389, 394 (1953).
[26] S. Rep No. 1268, 80th Cong., 2d Sess. (1948).
[27] 341 F.2d 527 (7th Cir.), *cert. denied*, 382 U.S. 850 (1965).
[28] 250 F. Supp. 833 (W.D. Pa. 1966).

100 hours monthly in minor religious work contrasted with 80 hours secular employment. The court has suggested at least a 160-hour basis. In *United States v. Dickinson*,[29] a ratio of 150/20 hours monthly was acceptable to establish a ministerial exemption. There is clearly a disparity between 150/20 hours monthly and 100/80 hours in the present case keeping in mind that the defendant was similar to a treasurer of a church body.

In *United States v. Stidham*,[30] the defendant, a Jehovah's Witness, was convicted for failing to report for civilian institutional work at the University of Missouri Medical Center as directed by his local board, after being classed I-O. The defendant had sought a ministerial classification, IV-D. The defendant worked in secular employment as a file clerk for 38 to 45 hours weekly. The ministerial status was claimed to date from the time the defendant was 12 years of age. The mother of the defendant was also alleged to be a minister. The defendant stated that he was the "literature servant" of his congregation. As a part of his questionnaire, the defendant filed a standard printed form of certificate of the Watchtower Bible and Tract Society which dubbed him to be a "literature servant."

The court in a lengthy decision held that the defendant failed to make out a prima facie case that he was a minister within the meaning of section 16 of the Act.[31] A prima facie case for ministerial exemption was not made out merely by filing a standard *printed form of certificate* from the Watchtower Society. The circumstance that the defendant was apointed a literature servant did not establish that his regular vocation was that of a minister within the meaning of the Act. Proof of church attendance does not make out a prima facie case that one is a minister.

By way of dicta, the court noted that local boards should not lightly regard the duty of ascertaining the facts in the matter of a claim for ministerial exemption since "courts will not hesitate to set aside any classification that is not supported by facts."

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[29] 346 U.S. 389 (1953).

[30] Although not so stated, this case amounts to a test of weighing the evidence. In Estep v. United States, 327 U.S. 114, 122 (1946), the court observed that the *courts are not to weigh the evidence* with regard to a local board classification. Only if there is no basis in fact, may the court intervene.

[31] 62 Stat. 624 (1948), as amended, 50 U.S.C. App. § 466(g) (1964).

United States v. Carkon[32] was a prosecution for knowingly refusing to obey an order to report for civilian work at Madison General Hospital. The defendant was classed as a conscientious objector rather than a minister (IV-D). The defendant was in secular employment as a pulp cutter averaging 50 hours weekly. On the religious side, the defendant had been assigned two public discourses, he had only 7 hours in the past year in the "field ministry," and devoted 21 hours a month to attendance at meetings. The defendant had appealed from his local board to the appeal board which acted de novo in a review of the defendant's file (cover sheet). The court convicted the defendant and stressed that what might have been possible error by the local board was cured by *de novo action by the appeal board.* There was a basis of fact for the conclusion by each of the local board and the appeal board that the defendant did not regularly preach and teach the religion of his sect as a vocation, but, rather, preached and taught, "irregularly." As dicta, the court commented that secular employment, as such, would not preclude a ministerial exemption.

B. *WHO IS A CONSCIENTIOUS OBJECTOR?*

In *United States v. Salamy,*[33] the defendant was charged with failure to submit to induction into the military. The defendant registered with his local board in May 1962 and did not assert that he was a conscientious objector. In December 1963, he claimed deferment (III-A) because of his father's health. In March 1964, the defendant attempted to volunteer for military service. On 10 April 1964, he filed a conscientious objector form with his local board. The court convicted the defendant noting that his interest in conscientious objection developed when finally actual military service was imminent. The sincerity and good faith of a claimant for an objector status is a proper matter for consideration by the local board and the appeal board. The board could consider such factors as the defendant did not claim to be a conscientious objector in 1962 or 1963, and in 1964 sought to volunteer for military duty.

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[32] 248 F. Supp. 1003 (W.D. Wis. 1965).
[33] 253 F. Supp. 616 (D. Okla. 1966).

C. *SELECTIVE SERVICE PROCEDURES*

1. *Failure to Grant a Hearing.*

In *United States v. Majher*,[34] the defendant was indicted for refusing to perform the civilian work prescribed for conscientious objectors. The defendant, a Jehovah's Witness, working 40 hours weekly in May 1963 in a factory, was denied a ministerial exemption by his local board. Thereafter, in August 1964, the defendant requested the board to reopen his status and to consider that (1) he had given up his factory work and was devoting full time to ministerial tasks and (2) that he was rated as a "Vacation Pioneer" in his congregation. The board refused an audience to the defendant and continued his I-O status. The court held that the board acted without a basis in fact in summarily refusing an audience (hearing) to the defendant where he might be able to prove that he had become in fact a minister and thus entitled to a IV-D classification. The board could not attribute to the defendant a lack of "sincere religious principles." Bad faith is not at issue in a claim for ministerial exemption. The indictment was dismissed.

United States v. Hestad[35] was a prosecution for failing to obey an order of a local board to report for civilian work at a hospital. The defendant was classed as I-O by the board, but was denied a ministerial classification (IV-D). The defendant had resigned from part time secular employment as a substitute mail carrier at $2.26 per hour after he was denied a ministerial classification, and thereafter worked as a janitor 12 hours weekly. He devoted over *200 hours* monthly to religious tasks. The local board despite this showing refused to reopen the defendant's classification to consider a claim for ministerial exemption. The court acquitted the defendant on the basis that the local board had improperly refused to reopen his classification in order that the increased time might be considered. Further, the board should have considered that the defendant had been appointed a "vacation pioneer minister." In view of the *changed circumstances* affecting the defendant's religious duties, the refusal of the board to reopen the

[34] 250 F. Supp. 106 (S.D. W.Va. 1966).
[35] 248 F. Supp. 650 (W.D. Wis. 1965).

defendant's classification was a violation of the due process clause under the fifth amendment.

2. *Denial of Right of Appeal.*

In *United States v. Olkowski*,[36] the defendant was charged with violations under the Act. His local board had classed him as a conscientious objector but denied a ministerial exemption (IV-D). The classification questionnaire of the defendant in 1962 showed that he was employed as a woods worker for 40 hours weekly; he spent 12 hours weekly in personal study preparing for the ministry and did some house-to-house preaching and gave some sermons, but without any indication of the time involved. In 1964, the defendant claimed to be devoting 23 hours weekly to "ministry" work, and for a time was a "vacation pioneer minister." The board refused to reopen his classification on the 1964 showing, and directed the defendant to report for civilian work. On this phase of the case, the court saw a basis in fact in the local board to support a denial of ministerial exemption. However, the court determined that the *defendant had been denied a right of appeal* to the appeal board from his local board. A letter from the defendant to the local board had requested a personal appearance before the board and also stated "I . . . appeal my I-O classification to the local board of appeal." The local board erred in never extending to the defendant an appeal to the appeal board. The *right of appeal is absolute*, and a purporting notice of appeal should be liberally construed in favor of the appellant. A motion by the defendant to dismiss was granted.

3. *Right to Counsel.*

In *United States v. Wierzchucki*,[37] the defendant was charged by information with failing to report for civilian work. The defendant moved to dismiss on the ground that he did not have the assistance of counsel at a "critical stage," namely, during the administrative period between his registration with his local board and the date when his classification was finally determined at the administrative level. The court denied the motion to dismiss on the basis that the Administrative Procedure Act[38] which guaran-

[36] 248 F. Supp. 660 (W.D. Wis. 1965).
[37] 248 F. Supp. 788 (W.D. Wis. 1965).
[38] 60 Stat. 240 (1948), 50 U.S.C. App. § 1005(a) (1964).

tees a right to counsel at all administrative stages does not apply to proceedings under the Universal Military Training and Service Act.[39] The court found that representation by counsel before a local board is expressly prohibited by presidential rule.[40] The sixth amendment right to counsel has not been held by the Supreme Court to apply at any time before arrest. Proceedings before a local board were not criminal in nature.

4. *Failure of Registrant to Appeal Classification.*

In *United States v. Hogans*,[41] the defendant was charged with failure to report for civilian work in lieu of military service. The defendant in February 1962 was classified I-A. On 17 January 1964, after physical examination, he was certified as acceptable for induction. On 28 January 1964, the defendant sought a IV-D classification on the basis that as a Jehovah's Witness he was a full time minister since December 1963. The defendant was working 37 hours weekly in secular manual labor earning $3,700 yearly. The board granted the defendant an I-O status on 18 February 1964, and the *defendant did not appeal from the local board ruling* although the notice (SSS form #110) informed him of his appeal rights. The defendant advised the local board that he would not perform civilian work as such work would compromise his beliefs. The court held that the failure of the defendant to appeal his classification within an allowed 10-day period was a failure to exhaust administrative remedies and prevented him from challenging his classification as a defense to a criminal prosecution. Further, the case of the defendant rested solely on his own statements without any independent corroborating evidence of ministerial activities. Preaching and teaching, part time, occasionally and irregularly, do not entitle a registrant to a ministerial classification. In Selective Service cases, the courts are not to weigh the evidence to determine if the local board classifications were justified.

United States v. Thompson[42] was a prosecution for a violation under the Act. The defendant was administratively processed partly in California and partly in Oklahoma. The defendant re-

[39] See 62 Stat. 604 (1948), as amended, 50 U.S.C. App. § 451 (1964).
[40] 32 C.F.R. § 1624.1(b) (1962).
[41] 253 F. Supp. 409 (E.D.N.Y. 1966).
[42] 253 F. Supp. 535 (D. Okla. 1966).

ceived in the mail three notices of classification in postcard form. Each of the postcards contained a statement of his right to appeal from the classification. The defendant claimed that he did not notice the printing on each card although the matter was set forth in bold black print. He testified that he was aware generally of the existence of a right to appeal within the Selective Service procedure. No case was made out by the defendant for a relaxation of the timely appeal requirement, nor did the defendant in writing request that his classification be reopened. The court convicted the defendent of the offense charged as due process had been satisfied in the matter of the card notice which specifically mentioned a right of appeal.

In *United States v. Biesiada*,[43] the defendant was prosecuted for failing to report for induction into the military. As a registrant, he had claimed to be a conscientious objector, but was classed I-A by his local board. The defendant did not appeal from the local board to the appeal board nor did he request a personal appearance. After being ordered to report for induction, the defendant asked that his classification be reopened. This request was denied. The defendant appeared at AFES, but refused to take one step forward when his name was called which thwarted the induction action procedure. At trial he urged that the local board wrongfully denied him an objector classification. The court convicted the defendant who had failed to take an available administrative appeal from the local board to the appeal board. Further, the defendant could not ask that his case be reopened *after* he had received an order to report for induction.

5. *Request for Reclassification After Order to Report.*

Before the Sixth Circuit in *United States v. Taylor*[44] was the status of a registrant who declared himself to be a conscientious objector *after* he was ordered to report for induction into the military. Previously, for a time he had been a member of a Ready Reserve unit. The following is the chronology of dates and events:

24 June 1957—joined Marine Corps Reserve (MCR).

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[43] 247 F. Supp. 599 (S.D.N.Y. 1965). The entire registration, classification, and induction procedure is summarized under the 1940 statute in Falbo v. United States, 320 U.S. 549 (1944), upholding the convicton of a conscientious objector who failed to report to assigned civilian work.

[44] 351 F.2d 228 (6th Cir. 1965).

10 October 1958—registered with Selective Service and as to a "Conscientious Objector," he wrote "Does not apply."
1 March 1960—classified I-D as a result of his MCR status.
1961—converted to become a Black Muslim.
November 1961—MCR advised local board that defendant was not fulfilling his reserve obligation.
26 December 1961—local board ordered defendant to report for induction on 15 January 1962.
8 January 1962—defendant filed claim to be a C. Ob.
15 January 1962—defendant did not report for induction.

The court in *Taylor* upheld the validity of Selective Service Regulation 1625.2[45] that a registrant claiming a change of classification after receiving an order to report for induction is not generally entitled to a change of status. The court cited and relied upon *Keene v. United States*[46] which set forth that the machinery of Selective Service cannot be "disrupted by last minute changes in status for purposes of avoidance."

D. *DESTRUCTION OF DRAFT CARD*

United States v. Miller[47] involved a charge of the destruction of a draft card. The court upheld the amendment to the Act set forth in section 12(b)(3)[48] as a reasonable exercise of the powers of Congress to raise armies in defense of the United States and the amendment met any applicable standards of substantive due process. The argument that the statute imposed a cruel and unusual punishment would have to await the occasion when a sentence might be imposed for an offense, and the question of possible punishment could not be raised at the time of a motion to dismiss the indictment. The defendant's demand by way of discovery proceedings to view the charred remains of the burned notice of draft classification (SS Form #110) would be denied as there was no showing that viewing the remains was material to the defense.

In *United States v. Smith*,[49] the defendant was charged with destruction of his draft card. On a motion by the defendant to

[45] 32 C.F.R. § 1625.2 (1962).
[46] 266 F.2d 378, 383 (10th Cir. 1959).
[47] 249 F. Supp. 59 (S.D.N.Y. 1965).
[48] 79 Stat. 586 (1965), 50 U.S.C. App. § 462(b)(3) (Supp. I, 1965).
[49] 249 F. Supp. 515 (D. Ia. 1966).

dismiss the indictment, the court ruled that the statutory amendment of 1965 which penalizes any person who willfully and knowingly destroys or mutilates any certificate, *i.e.*, of registration, was constitutional and a natural corollary to a regulation requiring a registrant to have his certificate in his possession at all times. There was no violation within this part of the statute of the due process clause of the fifth amendment, and the statute itself did not impair the defendant's freedom of speech nor his right to assemble peaceably. However, one count of the indictment failed in that it did not allege within the wording of the statute that the defendant willfully and knowingly mutilated and destroyed his registration certificate.

E. *MISCELLANEOUS CASES*

A conviction for willful failure to report for induction was reversed by the Second Circuit in *United States v. Mitchell.*[50] The defendant had discharged his counsel on Wednesday, the day of the trial, and asked the court for an extension of time to engage new counsel. The defendant informed the court that he did not lack funds, but had difficulty in finding an attorney in whom he would have confidence. The court allowed the defendant until the following Monday to engage counsel. On that date, the defendant had not obtained an attorney, and the court appointed an experienced trial lawyer to represent the defendant. The defendant then refused to accept any court appointed attorney. Trial proceeded, and the defendant refused to permit the attorney named by the court to assist him. The defendant did not call any witnesses nor offer any documentary evidence. The appellate court held that insufficient time, namely, from Wednesday until the following Monday, was allowed to the defendant in which to engage an attorney. The sixth amendment was infringed by compelling the defendant to go to trial on Monday without defense counsel of his own choice.

In order to illustrate the complex background of at least a portion of the prosecutions under the Act, the following facts are cited from the decision of the trial court in *Mitchell.*[51] The de-

[50] 354 F.2d 767 (2d Cir. 1966).

[51] 246 F. Supp. 874 (D. Conn. 1965). This outcome was superseded by the decision of the Second Circuit on an issue of law.

fendant had refused to fill out a classification questionnaire from his local board and had returned the form because he was " disaffiliating" himself from Selective Service. The defendant ignored an order to report for physical examination and failed to report upon an order for induction. For a period of over 3 years, the defendant disregarded all efforts by his local board. He had declared that "I plan to use my trial as a forum in which to try the United States Government before the world . . . and utilize every other means available to stir up a storm." The defendant mailed to his board a statement entitled "Challenge the Draft," and wrote: "I refuse to cooperate with any Koreas, Cuban invasions or blockades, Vietnams, or with the nuclear arrogance with which we threaten to blow up the world."

In *Le Ballister v. Warden, Disciplinary Barracks, Leavenworth,*[52] the petitioner had enlisted in the Nevada Army National Guard, entered upon active duty for training (ACDUTRA) and was to serve in a Ready Reserve section after ACDUTRA was completed. While on ACDUTRA, he was the subject of a special court-martial, where he pleaded guilty to charges of absence without leave and disobedience to orders. The petitioner at the trial urged that he was opposed to the taking of human life although he declared that he rejected the existence of God. With his local board, he had filed the form of a conscientious objector, but had been classified I-A. He then enlisted in the Ready Reserve because as he later stated he thought the "struggle" to be classed I-O was hopeless. His offenses while on ACDUTRA were stated to be expressions of rebellion against authority.

The court in *Le Ballister* dismissed the petition and concluded that the petitioner, who had been a university student, understood the probable consequences of his actions, and the court apparently attributed little merit to the conscientious objector contention.

United States v. Fedack[53] was a suit by the government based upon a student loan received by the defendant. The defendant had entered the Navy in 1944 under a Reserve program. An Act

[52] 247 F. Supp. 349 (D. Kan. 1965). As to the court-martial jurisdiction over a reservist during ACDUTRA, see *In re* Taylor, 160 F. Supp. 932 (W.D. Mo. 1958), where the accused was apprehended after his 6 months ACDUTRA terminated.

[53] 243 F. Supp. 342 (N.D. Ga. 1965).

of 1942[54] provided for the expenditure of public funds by the United States Office of Education in order to assist certain students entering the Armed Forces. The same statute provided for the cancellation of the indebtedness of a student inducted under the Selective Training and Service Act of 1940.[55] The court granted a motion for summary judgment by the plaintiff-government. The defendant in applying for and accepting a *commission* under the Navy Reserve program thereby *voluntarily* entered the military service and was not an inductee under the Selective Service laws. Accordingly, he was not entitled to cancellation of his student loan indebtedness which he was obligated to pay in full.

IV. DEPARTMENT OF DEFENSE REPORT

On 18 April 1964, President Johnson, at a specially called press conference, ordered a general study of military manpower policies in order to determine whether by the 1970's, Selective Service inductions might be eliminated. The Secretary of Defense was given the task of investigating and reporting on an alternative to the draft and with special consideration for meeting military manpower needs by the use of volunteers for the Armed Forces.[56]

On 30 June 1966, there was read before the House Committee on Armed Services a statement by the Honorable Thomas D. Morris, Assistant Secretary of Defense (manpower), entitled "Report on Department of Defense Study of the Draft."[57] The report attempted to set forth "problems in the Selective Service process" and then inquired (a) whether foreseeable manpower requirements could be met without the draft; (b) whether "improvements in pay" would sustain an all-volunteer force; and (c) assuming that the draft is continued, "are there ways of improving the process of choosing those men who must serve in uniform?"[58] The report confirmed "the essentiality of the draft, both to supply the residual number of men needed to man our forces, and to encourage a larger number of volunteers."[59]

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[54] Act of 2 July 1942, ch. 475, 56 Stat. 576.
[55] Ch. 720, 54 Stat. 885, as amended.
[56] New York Times, 19 April 1964, p. 1.
[57] Hereafter termed DDR.
[58] DDR 2.
[59] *Ibid.*

By way of background, the report developed that the Defense Department in accomplishing its study collaborated with the Military Service, the Bureau of Census, the Selective Service System, and the Departments of Labor and Health, Education and Welfare.[60]

Significant statistical data disclosed the very great influence of Selective Service in inducing men to enlist with the Armed Forces. Between September 1950 and June 1966, there were 188 draft calls or approximately one in every month. During this time, 11.3 million men entered upon or were called to active service. Of this number, 3.5 million or one in three were draftees. The average monthly induction rate was 18,600.[61] The report succinctly stated: "It has long been apparent that the pressure of the draft has a decided influence on the decision of many of the remaining two-thirds who volunteer."[62] The report went even further and concluded: ". . . our questionnaire survey showed that *only 29% would have volunteered in the absence of the draft.*"[63]

The following figures are extracted verbatim from the report and are self-explanatory to show that without the draft, the armed services and their reserve components would be seriously handicapped in obtaining men.[64]

Per Cent Who Would Not Have Volunteered Without The Draft

Group Queried	*All Services*	*Army*	*Navy*	*Air Force*	*Marine Corps*
Regular Enlistees	38%	43%	33%	43%	30%
Officers	41	48	40	39	27
Reserve Enlistees (Including National Guard)	71	72	75	80	50

In the instance of the Air Force, the data are startling in their implications. Eighty per cent of the Reserve, 39 per cent of the officers, and 43 per cent of the regular enlistees acted because of the effect and imminence of the Selective Service compulsory obligation. Comparable results apply to Navy, Army and Marine Corps.

The report particularized the following as the "problems" in the Selective Service process:

[60] DDR 3.
[61] DDR 3-4.
[62] DDR 12.
[63] DDR 14.
[64] DDR 13.

First, the present selection procedure calls the oldest men first—those who are the most settled in their careers.
Second, past deferment rules have favored college men—those who may be the more fortunate economically.
Third, past deferment rules have favored married men without children—thus putting a premium on early marriages.
Fourth, Department of Defense standards in recent years have disqualified men with lesser mental ability and educational attainment—those who may have been culturally deprived.[65]

As to the first problem, it was noted that during times of high draft calls, the average age of induction drops. Conversely, the age rises during a period of low draft calls. No solutions as such were suggested.

In the matter of the second problem, when draft calls were low, it is true that comparatively few college graduates entered upon military service. After college, an occupational deferment often followed. On the other hand, the military departments look to civilian colleges for 90 per cent of their new officers.[66] At the present time, the lower draft age and the tighter deferment rules will increase the number of college students and graduates who will be inducted.

Relative to the third problem, the Executive Order issued 26 August 1965[67] has corrected the situation that formerly married men without children were deferred in effect from call, and the report suggests that such a deferment base should never again be reinstituted.

As for the last problem, Department of Defense qualification standards are being subjected to a thorough review. Mental tests have been modified and already 40,000 additional men annually are now being qualified. Further revisions are anticipated. The prediction inherent in the report that standards of admission to the Armed Forces would be reviewed was borne out by a development in 1966. On 23 August 1966, the Secretary of Defense announced that within the next 10 months, a special call from

[65] DDR 7.
[66] DDR 9.
[67] Exec. Order No. 11241, 30 Fed. Reg. 11129 (1965).

Selective Service would reach 40,000 men ordinarily disqualified because of education or health. This number would gradually increase to the number 100,000 in succeeding years.[68] It was estimated that 85 per cent of such trainees would ultimately qualify for military duty. The trainees would come from both rejected draftees and enlistees. The Secretary went on to blame "poverty" for figuring in the prior rate of rejection of men for military service.

The report went into the possibility of maintaining an all-volunteer force through "improvements in pay and other manpower practises." The report tersely concluded that "the cost of sustaining an adequate all-volunteer force would be prohibitive."[69] A survey is quoted to the effect that pay increases for officers during their first two years would have to be in the range of 20–50 per cent to attract an all-volunteer officer force while for the enlisted personnel much steeper increases would be needed.[70]

V. STUDENTS

A. *SELECTIVE SERVICE COLLEGE QUALIFICATION TEST*

A major influence of Selective Service upon students in 1966 has been as the result of the College Qualification Test. On 17 March 1966, the Director released generally a Bulletin of Information dealing with the 1966 Selective Service College Qualification Test (SSCQT). The dates 14 May, 21 May, 3 June, and 24 June 1966 were designated when, at 1,200 locations throughout the United States, Puerto Rico, and the Canal Zone, an identical test would be administered to graduating high school seniors and college students. The examination was given by Science Research Associates of Chicago under a contract with the Selective Service System. The Associates prepared and conducted the test and then sent the score of each examinee to his own local board. The bulletin gave general data and a description of the nature of the examination. The various state directors distributed the bulletins to local boards for the dissemination of the information to interested registrants.

In order to be eligible, a registrant must have intended to seek

[68] Los Angeles Times, 24 Aug. 1966, p. 1.
[69] DDR 16.
[70] *Ibid.*

occupational deferment as a college student (II–S) and have his application postmarked no later than 23 April 1966. This later was extended to 1 June 1966. The examination was of the general aptitude type, covering four categories: reading comprehension, arithmetic reasoning, verbal relations, and data interpretation.

A new section 1622.25(a) was added to the Selective Service Regulations concerning the classification of college students.[71] The regulation developed the criteria for Class II–S. It states that the registrant's study may be considered necessary to the maintenance of the national health, safety or interest when any of the following conditions exist:

a. He has successfully completed his *first* college year ranking within the upper *1/2* of the full time male students or attained a score of 70 on the SSCQT, and be accepted for a second year full time course.

b. He has successfully completed his *second* college year ranking within the upper *2/3* of the full time male students or attained a score of 70 on the SSCQT, and be accepted for a third year full time course.

c. He has successfully completed his *third* college year ranking within the upper *3/4* of the full time male students or attained a score of 70 on the SSCQT and be accepted for a fourth year full time course.

d. His course requires more than *four* college years and in his last undergraduate year be ranked within the upper *3/4* of the full time male students or attained a score of 70 on the SSCQT and been accepted for a fifth or subsequent year.

e. He has been accepted by a graduate or professional school of law, medicine, dentistry, veterinary medicine, osteopathy, optometry, pharmacy, chiropractic or chirobody, and, in his last undergraduate year ranked within the upper *1/4* of the full time male students or attained a score of *80* on the SSCQT.

On 14 May 1966, the first day of the test, in excess of 350,000 college students took the examination.[72]

B. *REGISTRANTS OPPOSED TO THE DRAFT*

A point of controversy has arisen as to what position might be

[71] 31 Fed. Reg. 4893 (1966) (effective 23 March 1966).
[72] Washington Post, 15 May 1966, p. A1.

adopted by a local board towards a registrant who publicly demonstrates and agitates against the draft of men for the armed services. The following is from a memorandum prepared by National Headquarters Selective Service System on the subject "Student Deferment," released in January 1966, and attributed to the Director:

> The deferment of a student is based on a determination that he is full time and remains a satisfactory student . . . . Local boards must use their best judgment in each individual case. When a student is satisfactory is, of course, a matter of judgment . . . . A student to be satistory to the local board must not disobey the law or regulations of the Selective Service System . . . . Deferment is not for the convenience of the individual registrant, although the Nation's interest may at times coincide with the registrant's desires.
>
> Military service is a privilege and obligation of free men in a democratic form of government. It follows that the induction of a registrant is not, and cannot be, a punishment. . . . It is recognized by educational institutions that breaking their rules disqualifies a student from being a satisfactory student. It should be just as clear that breaking and defying the laws of the Nation are even greater evidence of failure to remain a satisfactory student . . . . For the student, that means the maximum in effort and the highest in devotion to the best image of a student.

In the last analysis, the status of a student is determined by his local board subject to appeal to his district appeal board.

VI. SPECIAL CALLS FOR MEDICAL PERSONNEL AND ALLIED SPECIALISTS

Under Executive Order No. 11266, dated 18 January 1966, the President delegated to the Director of Selective Service the authority to determine the categories of persons included in the term "allied specialist category."[73] Pursuant to the delegated authority, the Director added to section 1622.30(a) of the Selective Service Regulations a provision that *male nurses* and *optometrists* are included in the allied specialist category.[74]

On 16 February 1966, the Department of Defense requested that 900 registered male nurses be delivered to AFES.[75] The Defense Department has requested 100 optometrists for the Army beginning in July 1966.[76] It is anticipated that the male nurses and optometrists will be commissioned.

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[73] 31 Fed. Reg. 4893 (1966).

[74] *Ibid;* Sel. Serv. System, Nat'l Hq., Operations Bull. No. 288, as amended, (31 March 1966), disseminated the information through the System.

[75] Selective Service, vol. 16, No. 3, March 1966, p. 1.

[76] Selective Service, vol. 16, No. 4, April 1966, p. 1.

The most numerous category of medical personnel of course include physicians, dentists, and veterinarians. In order to enter upon active duty beginning in January 1966, the Department of Defense placed a special call in September 1955 for 1,529 physicians, 350 dentists, and 100 veterinarians.[77] An additional call for physicians was made for 2,496 for July 1966. This subsequently was reduced to 1,713 of whom 958 were assigned to the Army, 405 to the Navy, and 350 to the Air Force.[78] The cut in the totals called in 1966 was due to increasing numbers of physicians volunteering for active duty and to reduced casualty-rate estimates.

Effective 3 January 1966, the Secretary of Defense announced a modified procedure designed to speed up the processing of physicians. Each AFES was instructed to overcome by mid-January any backlog of physicians cases. After 15 January, each AFES must complete no less than 90 per cent of its physicians files within three days of their receipt at AFES.[79]

Local boards have been instructed to anticipate special calls for physicians by reclassifying all interns who are finishing intern training. Previously, interns have been placed in Class II–A. Interns will be permitted to finish their intern period, but will be reached promptly at the end of that interval.[80] Additionally, local boards are acting to inventory and keep separate records for physicians, dentists, and veterinarians. Separate identification is maintained and the individual coversheets are maintained apart

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[77] Records of Selective Service System, Washington, D. C. A "Doctor's Draft," enacted in 1950, expired 1 July 1957. See Act of 9 Sept. 1950, ch. 939, 64 Stat. 826. The draft of doctors was upheld in Bertelsen v. Cooney, 213 F.2d 275 (5th Cir.), *cert. denied*, 348 U.S. 856 (1954). The needs of the armed services for physicians, dentists, and veterinarians are now filled from regular registrants in these professions.

[78] Digest of Library of Selective Service System, Washington, D. C., 15 July 1966, p. 1; Selective Service, vol. 16, No. 7, July 1966, p. 1. The Department of Defense called to active duty, via Selective Service in July 1965, 1,085 physcians who were allocated: Army, 595; Navy, 320; and Air Force, 170. 1965 REPORT 27. Called for July 1964 were 1,175 physicians, who were allocated: Army, 650; Navy, 325; and Air Force, 200. 1964 REPORT 20. One hundred veterinarians for the Army were called in 1964. 1965 REPORT 22. In 1963, 1,250 physicians were called. In fiscal year 1962, 1,025 physicians, 154 dentists, and 67 veterinarians were called. 1963 REPORT 22.

[79] Selective Service, vol. 16, No. 2, Feb. 1966, p. 1.

[80] Sel. Serv. System, Nat'l Hq., Operations Bull. No. 290 (26 Jan. 1966).

in separate files from the mass of registrants.[81] Keeping in mind that the average number of registrants is 7,554 for each local board,[82] the specific identification of special registrants, such as physicians and like allied specialists, is highly desirable at the board level.

The extension of a commission to a registrant in the healing arts is facilitated by the local board. Upon the issuance to a physician or a like specialist of an induction order which is effective 30 days after date of issuance, the Commanding General of the appropriate army area is advised by the receipt of a copy of the order. The Commanding General allocates the registrant to one of the armed services, and the particular service then tenders a commission if the registrant is otherwise qualified. In the instance of a male nurse, the allocation is made by the Surgeon General of the Army, and the particular service concerned may allow either a reserve commission or a warrant as warrant officer.[83]

In 1966, the status of physicians in the Public Health Service who have an obligation for military service under the Act was clarified. Beginning in January, the status of a commissioned officer in the Public Health Service is reported to Selective Service which normally places such an officer in Class II–A (occupational deferment).[84]

VII. CONSCIENTIOUS OBJECTORS

The topic of "Litigation" within this article has disclosed that the status of a conscientious objector is the subject of constant court proceedings within the federal system. The Act allows an I–O status to a registrant who convinces his local board that he has conscientious scruples against military service. Such a registrant is spared from service with the military, but is subject to 2 years of civilian work contributing to the maintenance of the national health, safety or interest, as his local board may deem

[81] Sel. Serv. System, Nat'l Hq., Local Board Memorandum No. 77, as amended, 3 May 1966 (issued to all local boards).
[82] 1965 REPORT 48–50.
[83] Sel. Serv. System, Nat'l Hq., Operations Bull. No. 295 (23 March 1966).
[84] Sel. Serv. System, Nat'l Hq., Operations Bull. No. 279 (20 Sept. 1965).

appropriate. The objector who is performing civilian work is classed in I–W.

Many registrants, while opposed to bearing arms, are not averse to military service as such. The local board may classify such a registrant as I–A–O, and he usually performs his service creditably in such branches as the Medical Corps. A constant difficulty is that several religious sects, such as Jehovah's Witnesses, consider most of the adherents of the sect to be "ministers." The litigation cited shows that many registrants, although allowed a classification of I–O, demand a ministerial status, IV–D. A minister is not assigned by the Selective Service to any civilian work to be performed in the national interest. When a classification of minister is denied under the facts, the I–O registrant may refuse to perform the assigned civilian work and will risk criminal prosecution.

The registrant who consents to perform civilian work is not ordered, sight unseen, to any particular form or place of such work. He is invited to name his preferences for civilian work and the board will seek to follow his choice, if otherwise practicable. Ultimately, he is directed by the board to his future place of employment, such as a county or a state hospital or a charitable institution. He does not report via AFES, but simply proceeds to the agreed location where he will render service at the prevailing wage.

A recent survey has covered the I–W work program from July 1952 through March 1965. Thirty-nine per cent of the work projects are tied in with religious organizations. Provision was made for some performance of the I–W obligation overseas, and 28 per cent of the conscientious objectors in this field worked in Germany. The following information[85] shows the pattern of the employers of I–W service:

Religious hospitals (general)	360
Religious agencies other than hospitals	353
Private nonprofit hospitals (general)	278
State hospitals (mental)	216
City or county hospitals (general)	192
All foreign projects	180
State agencies (not hospitals)	149
Private charities	139
City or county agencies (not hospitals)	134
Private hospitals (general)	114

[85] Selective Service, vol. 16, No. 3, March 1966, p. 3.

On 1 June 1966, 4,273 I–W's were at work in assigned employment. By that date, 5,986 others had been released from I–W service after satisfactory performance of directed civilian work.[86]

VIII. MISCELLANEOUS

The Director has informed the Selective Service System that the Secretary of Defense has approved a change in the mental standards for induction and enlistment effective 1 April 1966. Registrants who receive percentage scores of 16 through 30 on the Armed Forces Qualification Test are qualified for service if they have a score of 90 or better in any two aptitude areas. The end result is easier admission to the services for numerous high school graduates.[87]

General Harold K. Johnson, Army Chief of Staff, announced a crackdown on reservists who avoid scheduled drills with their Ready Reserve units. The General pointed out that members of Army Reserve and Army National Guard who fail to meet required standards of efficiency may be referred to Selective Service for entry upon 2 years of active duty.[88] In the form of a written order, General Johnson specified that three unexcused absences in any year "are considered excessive." The order particularly concerns those reservists who have never performed extended active duty and are below the age of 26 years. During the ages of compulsory service, 18–25 years, an approved level of efficiency must be maintained.

Section 1631.8(a) of the Selective Service Regulations[89] provides for "priority induction," sometimes termed "accelerated induction," of any registrant who is a member of the Ready Reserve and who fails to perform satisfactorily. In fiscal year 1965, only 290 reservists were reported to their local boards as unsatisfactory.[90] The effect of General Johnson's order should be to maintain existing high standards of performance. In that many Ready Reserve sections and units have waiting lists of registrants

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[86] Selective Service, vol. 16, No. 7, July 1966, p. 3. For a discussion of conscientious objection generally, see Shaw, *Selective Service: A Source of Military Manpower*, 13 MIL. L. REV. 35, 60–63 (1961).

[87] Sel. Serv. System, Nat'l Hq., Operations Bull. No. 294 (18 March 1966).

[88] Sacramento Bee, 2 May 1966, p. A1.

[89] See Exec. Order No. 11188, 29 Fed. Reg. 15563 (1964).

[90] 1965 REPORT 28.

seeking admission, an inefficient reservist may expect early induction to active duty.[91]

The President has resolved the question of the status of a married registrant with one child. Executive Order No. 11266[92] has amended the Selective Service Regulations to declare that any registrant who has a child with whom he maintains a bona fide family relationship and who is not a physician, dentist, or veterinarian shall be placed in a Class III–A (dependency deferment). Executive Order No. 11241, effective 26 August 1965,[93] removed the deferment of married men without children. Reference to the classification picture in part I of this writing will disclose that Class I–A and I–A–O registrants are totaled numerically by Selective Service as either single or married before or after 26 August 1965.

IX. APPOINTMENT OF A NATIONAL ADVISORY COMMISSION

By Executive Order No. 11289, dated 6 July 1966,[94] the President created a National Advisory Commission on Selective Service (NAC) whose functions will be to review the draft policies of Selective Service. The 20-member body is chaired by a former assistant attorney general who is now a vice president and general counsel of a large corporation. The NAC includes, among others, a former cabinet member of this administration, two presidents of international unions, a former surgeon general of the United States Public Health Service, a probate court judge, one clergyman, a former White House press secretary, a former assistant secretary of defense, a former director of CIA, two college presidents, a former commandant of the Marine Corps, and at least two federal employees.

The aims of the commission, as directed by the President, are

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[91] See Feldman v. Local Board No. 22, 239 F. Supp. 102 (S.D.N.Y. 1964), holding that, under the facts, an Army reservist facing accelerated induction under section 1631.8(a) of the Selective Service regulations could not enjoin his local board of the New York City Director of Selective Service from proceeding against him nor gain declaratory relief.

[92] 31 Fed. Reg. 743 (1966).

[93] 30 Fed. Reg. 11129 (1965).

[94] 31 Fed. Reg. 9265 (1966).

to consider the past, present and future of the Selective Service System and to report by 1 January 1967 with regard to:

1. Fairness to all citizens.
2. The nation's military manpower requirements.
3. Reducing uncertainty and interference with individual careers and education.
4. Social, economic, and employment conditions and goals.

Based on its study, the commission will make recommendations concerning such features as:

a. Methods of classification and selection of registrants.
b. Registrants' qualifications for military service.
c. Grounds for deferment and for exemption.
d. Procedures for appeal and the protection of individual rights.
e. Organization and administration of the Selective Service System at the national, state, and local level.[95]

This is the sixth commission appointed by a President to consider Selective Service in some of its various phases. The first meeting of the NAC was held on 30 July 1966. The Secretary of Defense and the Director of Selective Service discussed with the commission members some of the basic factors underlying operation of Selective Service and military manpower requirements. The commission meeting was opened by a White House Special Assistant representing the President.[96]

X. REPLACEMENT OF SELECTIVE SERVICE?

The year 1966 has indeed brought forth a plethora of solutions and proposals for the amendment or other change of the present Selective Service structure. In a real sense, the expiration date of the statute is 1 July 1967, when the 4-year period expires from the last extension by Congress from 1 July 1963.[97] One such proposal has been the appointment of the National Advisory Commission mentioned above.

Another proposal was made by the Secretary of Defense. On 18 May 1966, he suggested a form of universal service for "all young Americans."[98] The Secretary envisioned that young Ameri-

[95] *Ibid.*
[96] Washington Evening Star, 31 July 1966, p. 1.
[97] 77 Stat. 4 (1963), 50 U.S.C. App. § 467(c) (1964).
[98] Washington Post, 19 May 1966, p. A1.

cans (ages not specified) would serve the country in either military or peaceful endeavors for 2 years. Speaking before the American Society of Newspaper Editors, the Secretary described as an "inequity" in the present law, the circumstance that the draft allegedly reaches only a minority of eligible young men. He called for a "community of effort" to reach a "dedicated generation" of all young Americans serving throughout the entire world. However, he declared the United States must not be a "global gendarme," and other nations should likewise require peace service from the young leading to "exchange programs."

A Gallup poll on the merits of the McNamara 2-year service plan showed, in July 1966, that a majority of the public seems to favor 2-year obligatory service by all young men.[99] The poll is reported to show that 72 per cent of the public favors two years of service, either in the military or in nonmilitary projects at home or abroad. Twenty-one per cent opposed the notion while 7 per cent were undecided. The explanation of the poll by the American Institute of Public Opinion stresses that *all polls since 1942 have produced majorities in favor of military or civilian service* in some form. In another of the answers received in the same survey, it is reported that a greater proportion of the public favors a "son" serving in the armed forces rather than in nonmilitary work.[100] A majority of those polled did *not* favor a lottery system of selection over the present local board individual selection method.

Twenty-four congressmen have charged that the present Selective Service policies "result in constant over-drafting from some states and constant under-drafting from others." An example cited was that draft calls allegedly are higher in Michigan than in Texas. It was contended further that states with "efficient boards" draft more men than do states with "inefficient boards."[101] An additional charge was that National Headquarters of the Selective Service system provided no "clear national direction," and, as a result, local boards "apply different criteria to identical cases." The release from the solons concluded that Congress allegedly has not given an intensive study to the draft in the last 15 years.

[99] Washington Post, 3 July 1966, p. A7.
[100] *Ibid.*
[101] Sacramento Union, 5 June 1966, p. C1.

In refutation of the Texas-Michigan alleged inequity in numerical calls, a United States senator from Texas and the state director pointed out that there were approximately 300,000 Texans in the Armed Forces and about 270,000 from Michigan, and, as a result, a draft call might be lighter in Texas, of necessity.[102] This incident may serve to illustrate that although the explanation of an alleged inequity often is not readily apparent, it may be forthcoming from Selective Service.

On 7 March 1966, Senator Everett Dirksen caused to be entered into the Congressional Record a memorandum by the Director, General Hershey, to the Senator discussing the criteria followed in Selective Service for meeting increasing draft calls.[103] The Director stressed the following:

> The Selective Service System exists to insure the maintenance of the Armed Forces necessary for our defense. . . . Under the law and regulations every registrant is deemed available for service (Class I–A) until it is demonstrated to the satisfaction of the local board that he should be temporarily deferred or exempt in the national interest. A registrant who is deferred earns no vested right to the deferment. . . . Enlistments have increased substantially a major part of them traceable directly to the existence of the selective service obligation and local board processing.
>
> It has been determined that the student population should be screened more closely. To that end, the System is instituting a program similar to that used during and after Korea of considering a student's standing in his class or his score on a special test . . . .
>
> The current pool of available manpower 19 to 26 may well be depleted by June of this year . . . . In order to insure adequate manpower for induction and enlistment, some men now deferred must revert to Class I-A, available for service. The task of the local board is to determine which registrants these should be. . . .
>
> Selective Service is the oldest and most universal method of raising armed forces. . . . The present Selective Service System is not an experiment. . . . The [System] is founded upon the grassroots principle, in which boards made up of citizens in each community determine when registrants should be made available for military service. There are more than 4,000 of these local boards located in every community throughout the Nation. . . .
>
> The Selective Service law recognizes the importance of the decentralization principle by making the Governor of each state the nominal head of Selective Service within his State. The law further requires a State headquarters in each of the States.

The House Armed Services Committee, in June 1966, began hearings to review complaints against the workings of the Selec-

[102] *Ibid.*

[103] Congressional Record, Senate, pp. 4891–92, 7 March 1966.

tive Service System. The chairman announced that the committee would consider alleged inequities operating against the "poor" and the "uneducated" in the administartion of the law. Senator Edward Kennedy outlined a plan to the committee for a *national lottery* method of selection of men. The local boards would register and examine men and those qualified would be assigned numbers. Once yearly, in the Kennedy plan, Selective Service in Washington would pick numbers by lottery. Men whose numbers were chosen would be called first in the order of their numbers, and the result, it was asserted, was that all men, rich or poor, married or single, college or noncollege, would take their chances.[104]

The Director was called by the House Armed Services Committee. He termed the lottery concept an "illusion," praised the "date of birth" method which is now followed, and concluded that it would be a grave weakness to substitute "chance for judgment" in the area of proper utilization of our manpower. The Director went on to point out:

> While local and appeal boards have the sole authority to determine availability for service, the Secretary of Defense is given sole authority to determine acceptability. The Armed Forces set medical, mental and moral standards which inductees, enlistees, and others must meet to enter services. The Armed Services apply these standards by examinations conducted by Armed Forces personnel at Armed Forces installations.[105]

Speaking before an assemblage of summer students on 18 August 1966 in the Washington, D.C., area, President Johnson characterized the Act as a "crazy-quilt" law. He went on to state that allegedly the law is "applying to some but not to others."[106]

The President reminded his audience that he has appointed a National Advisory Commission to inquire into the workings of Selective Service. He called for a revival of the ancient ideal of "citizen soldiers who answer their Nation's call in time of peril." Perhaps the essence of the President's remarks is set forth in his question expressed before the group: "Can we—without harming national security—establish a practical system of nonmilitary alternatives to the draft?"

The President's comments recall the proposal by the Secretary of Defense on 18 May 1966 at Montreal to the effect that young

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[104] Sacramento Union, 3 July 1966, p. D3.
[105] Selective Service, vol. 16, No. 7, July 1966, pp. 2–4.
[106] San Francisco Chronicle, 19 Aug. 1966, p. 1.

Americans should give 2 years of service to the nation either in a military or in a civilian capacity.[107]

XI. CONCLUSION

The signs portend that the year 1967 may witness broad attempts to alter and amend the present Selective Service structure. A factor of great import is present in what seems to be the interest of the President to bring about a change in the Selective Service System.[108] The appointment of the NAC following promptly upon the release on 30 June 1966 of the 2-year investigation results and favorable report of the Department of Defense[109] may show at least a purpose in the Chief Executive to keep alive the notion of changes in the Selective Service System.

The paradox in the situation is that Selective Service succeeds in its function, which is to screen and produce qualified men immediately available for military training and service. Additionally, Selective Service is the major force inducing great numbers of registrants to anticipate impending induction by enlistment with the armed services. Public opinion polls seem to favor 2 years of enforced service in the military by young men.

The present Selective Service System has been a part of the American way of life since 1940. The System grew out of over 200 years of trial and error in military manpower procurement in colonial America and the United States.[110] It is submitted that we should move slowly and only after the fullest impartial study before we scrap any part of the present workable System in favor of what may prove to be panaceas costly in lives and money.

WILLIAM LAWRENCE SHAW*

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[107] See Washington Post, *supra* note 98 and accompanying text.

[108] See report of remarks of the President, 18 Aug. 1966, in Selective Service, *supra* note 105 and accompanying text.

[109] See notes 56–70 *supra* and accompanying text.

[110] See generally Shaw, *supra* note 86, at 35–51.

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